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Supreme Court, U.S.
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No. ________

In The

Supreme Court of the United States

October Term, 1998

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HON. ANDREA J. FERRARA,

Petitioner,

vs.

MICHIGAN JUDICIAL TENURE COMMISSION,

Respondent.

◆

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Michigan

◆

PETITION FOR WRIT OF CERTIORARI

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Bendure & Thomas
Mark R. Bendure (P23490)
Counsel of Record
577 East Larned, Suite 210
Detroit, Michigan 48226-4392
(313) 961-1525

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

I. WHETHER THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION, ART. VI, § 2, PERMITS A STATE TO REFUSE TO APPLY TITLE III OF THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1967, 18 U.S.C. § 2510 *ET SEQ.*, IN JUDICIAL TENURE PROCEEDINGS: BY PRECLUDING AN EVIDENTIARY HEARING SOUGHT UNDER 18 U.S.C. § 2518(10)(a); BY REFUSING TO APPLY 18 U.S.C. § 2515, WHICH BARS THE USE OF EVIDENCE OBTAINED IN VIOLATION OF THE ACT AND EVIDENCE DERIVED THEREFROM; AND BY PUNISHING FOR CONTEMPT A WITNESS'S INVOCATION OF THE FEDERAL STATUTE AND *GELBARD v. UNITED STATES*, 408 U.S. 41 (1972) IN DECLINING TO ANSWER A QUESTION BASED ON A TAPE WHOSE LEGALITY WAS CHALLENGED BUT UNDECIDED.

II. WHETHER, CONSISTENT WITH THE SUPREMACY CLAUSE AND THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, A STATE JUDICIAL TENURE COMMISSION MAY BASE JUDICIAL REMOVAL PROCEEDINGS ON THE USE OF RACIAL EPITHETS IN PRIVATE CONVERSATIONS, INCLUDING COMMENTS ABOUT PUBLIC OFFICIALS, WITHOUT AFFORDING THE ACCUSED AN OPPORTUNITY TO SEEK DISMISSAL ON FIRST AMENDMENT GROUNDS.

III. WHETHER THE DUE PROCESS GUARANTEES OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES ARE SATISFIED BY STATE JUDICIAL TENURE COMMISSION PROCEDURES WHICH DENY THE ACCUSED THE

OPPORTUNITY TO PRESENT EVIDENCE REGARDING TAPES WHICH ARE THE SOURCE OF THE MISCONDUCT FINDINGS; WHICH ADOPT A NOVEL *EX POST FACTO* CONSTRUCTION OF "OBSTRUCTION OF JUSTICE" AND "FRAUD ON THE COURT" TO DISCIPLINE PETITIONER FOR CONDUCT WHICH WAS NEITHER UNDER THE LAW EXISTING AT THE TIME OF THE CONDUCT; WHICH PERMIT CHARGING AN ACCUSED AFTER THE FACT FOR PRIOR TESTIMONY PRESENTED TO REFUTE THE ORIGINAL CHARGE; AND WHICH PERMIT THE STATE TO DISCIPLINE A JUDGE FOR CONDUCT WHICH WAS NEVER CHARGED OR LITIGATED.

PARTIES TO PROCEEDINGS

In the general election of November, 1992, Petitioner ANDREA J. FERARA was elected to serve as a Judge of the Michigan Circuit Court for the 3rd Judicial Circuit. That Court, serving Wayne County, Michigan, is the State trial court of general jurisdiction. Respondent was re-elected in the November, 1994 election. She remained a circuit court judge until removed through the Judicial Tenure Commission proceedings which are the focus of this Petition.

Respondent MICHIGAN JUDICIAL TENURE COMMISSION is the agency which initiates, then reviews, charges of judicial misconduct against a sitting judge. The Commission appoints an Executive Director (also known as the "Examiner") who serves as prosecutor. The charges are initially heard before a Master appointed by the Michigan Supreme Court. The Master's report is then reviewed by the Judicial Tenure Commission, whose recommendation, in turn, is reviewed by the Michigan Supreme Court. The Judicial Tenure Commission prosecuted the charges brought against Petitioner.

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OPINIONS AND ORDERS BELOW

Petitioner filed a pre-trial motion to dismiss, contending that the statements attributed to her in the Formal Complaint are protected by the First Amendment, and were obtained in violation of 18 U.S.C. § 2510 *et seq.* Those arguments were rejected, as was Petitioner's request for an evidentiary hearing. The oral ruling and Order (A1-A4) are not reported.

Petitioner filed a formal motion seeking an evidentiary hearing. That motion was also denied by oral ruling and Order (A8-A13), neither of which is reported.

Petitioner filed a motion for superintending control, asking the Michigan Supreme Court to review the Master's refusal to consider the First Amendment issues on the merits and her refusal to allow an evidentiary hearing. The Michigan Supreme Court denied the motion for superintending control (A14). That Order is not published.

Before the trial began, the Master ruled that Petitioner had a standing objection, based on 18 U.S.C. § 2510, *et seq.*, to the admission of the tapes and evidence derived therefrom (A15). That decision is also unpublished.

During the trial, the Master admitted the tapes, ruling that 18 U.S.C. § 2515 does not apply to Michigan Judicial Tenure Commission proceedings, at least not when the tapes have been voluntarily provided to the Government[1] (A16-A32). That ruling is not reported.

During the trial, Petitioner was called to testify by the Examiner. He played a portion of a tape, asking Petitioner about its content. Petitioner respectfully declined to answer, citing her rights under 18 U.S.C. § 2515 and *Gelbard v. United States*, 408 U.S. 41 (1972). By unpublished oral opinion and Order, the Master found Petitioner in contempt and barred her from presenting any evidence about the tapes (A33-A40).

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[1] In her Report, the Master found that the tapes had been produced by Mr. Tarjeft without government compulsion. In fact, Tarjeft filed a written objection to the seizure. After the Master's ruling was made, the Examiner admitted that the tapes had been obtained by the compulsion of subpoena, and the Judicial Tenure Commission so found.

The Master issued her Report and, on review, the Judicial Tenure Commission issued its Report and Recommendation (A70-A74). Neither opinion is reported.

This recommendation was appealed to the Michigan Supreme Court, the State's court of last resort. Its Opinion removing Petitioner from judicial office is reported as *In re Ferrara*, 458 Mich. 350; ___ N.W.2d ___ (1998).

Petitioner filed a Motion for Rehearing, contending, *inter alia*, that it was constitutionally impermissible to discipline Petitioner for conduct never charged against her, and to adopt a definition of "obstruction of justice" to punish Petitioner for conduct which did not constitute "obstruction of justice" at the time. The Michigan Supreme Court denied the Motion for Rehearing in a published Order, *In re Ferrara*, 459 Mich. 1205; ___ N.W.2d ___ (1998).

SUPREME COURT JURISDICTION

The published decision of the Michigan Supreme Court was issued on July 28, 1998. Petitioner sought rehearing within the applicable 21 day period of M.C.R. 7.305(D)(1).[2] The Court docketed the Motion for Rehearing and issued its Order denying the Motion for Rehearing on October 7, 1998. Petitioner invokes the certiorari jurisdiction conferred on this Court by 28 U.S.C. § 1257(a), which provides:

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[2] Respondent argued in the State Court that a different rule, permitting a rehearing petition within 14 days, was the controlling time limit. On that basis, Respondent sought to dismiss the Rehearing Motion. The State Court rejected Respondent's proposed construction of the Michigan Court Rules by granting Petitioner's Motion To Docket.

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."

This Petition, filed within 90 days of the Michigan Supreme Court Order denying rehearing, is timely under this Court's Rule 13.3.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner relies on Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520. 18 U.S.C. § 2511(1)(a), (b), and (c) make criminal the interception of, or use of a device to intercept, any wire, oral, or electronic communication, as well as the use or disclosure of any such communication with reason to know it was unlawfully obtained:

> **§ 2511. Interception and disclosure of wire, oral, or electronic communications prohibited**
>
> **(1)** Except as otherwise specifically provided in this chapter any person who
>
> > (a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;
>
> * * *

> (c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; or
>
> (d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5)."
>
> [18 U.S.C. § 2511(1)(a), (c), and (d)]

Section 2511(2)(d) permits participant interception generally, but not if the interception is for criminal or tortious purposes:

> "It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or law of the United States or of any State."
>
> [18 U.S.C. § 2511(2)(d)]

Section 2515 is a statutory exclusionary provision which bars the use of the contents of any unlawfully intercepted communication and evidence derived therefrom:

> "Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial,

> hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter."
>
> [18 U.S.C. § 2515]

Section 2518(10)(a) addresses the procedure for moving to suppress evidence obtained in violation of Title III:

> "Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that –
>
> (i) the communication was unlawfully intercepted;
>
> (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
>
> (iii) the interception was not made in conformity with the order of authorization or approval.
>
> Such motions shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice."
>
> [18 U.S.C. § 2518(10)(a)].

Petitioner also relies on the Supremacy Clause, First Amendment, and Fourteenth Amendment of the Constitution of the United States. These provisions provide:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."
>
> [Article VI, ¶ 2]
>
> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."
>
> [First Amendment]
>
> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."
>
> [Fourteenth Amendment, § 1]

STATEMENT OF THE CASE

Petitioner was previously married to Howard Tarjeft, with whom she had twin sons. The marriage was short-lived. The divorce judgment, as finally amended, provides Petitioner with custody of the children, Tarjeft with supervised visitation, and modest child support.[3] The post-divorce relationship was aptly characterized by the Master as one which made the movie, "War of the Roses" a bed of roses by comparison (Master's Report, A50-A69).

By 1992, Tarjeft had fallen far in arrears on his child support. He and Petitioner had a tumultuous relationship, marked by periods of civility and periods of hostility. The parents quarreled often about visitation, but Tarjeft was allowed unsupervised visitation despite the court order. He hoped to some day obtain custody.

Petitioner was elected in the November, 1992 general election as a judge in Wayne County Circuit Court.[4] She took office in January of 1993, and served continuously as a circuit court judge from that time until her removal on July 28, 1998. Unbeknownst to Petitioner at the time, Tarjeft was surreptitiously taping their 1992-1993 telephone conversations.

In 1996, Tarjeft and Petitioner were involved in a controversy over custody of their children. He demanded that Petitioner give him custody. When she refused, he reviewed the 1992-1993 tapes, found excerpts which contained offensive language, and created an "excerpt tape". This contained portions of several 1992-1993 conversations which Tarjeft had taped then. He provided the "excerpt tape" to a reporter for the Detroit Free Press, which ran a major article, quoting the content of the tapes, and branding Petitioner a racist.

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[3] The rulings of the Master precluded much of the evidence Petitioner sought to present to show that Tarjeft taped their conversations for tortious or criminal purposes in violation of Title III. Still, the testimony of Petitioner, her pleadings, and her offers of proof were ample for the Master and the Michigan Supreme Court (Opinion, pp. 4, 6) to understand the relationship. In a related federal case in the United States District Court for the Eastern District of Michigan, *Ferrara v. Free Press*, #97-71136, the Hon. Patrick Duggan has denied a summary judgment motion, ruling that there is sufficient evidence that Tarjeft acted illegally. The State Court rulings in this case were premised on the assumption that Tarjeft violated Title III.

[4] Petitioner has previously been a district court judge, defeated for re-election, then employed by the INS during the 1992 campaign.

The Judicial Tenure Commission ("JTC") reacted by issuing a subpoena for the "excerpt tape" and the "original" 1992-1993 tapes from which the "excerpt tape" was made. It filed a Formal Complaint, and then an Amended Complaint.[5]

Other than an alleged statement to her son, and one other exception,[6] the Amended Complaint accused Petitioner of judicial misconduct for using improper language during the 1992-1993 conversations which Tarjeft had secretly taped.

Petitioner was accused of calling one elected circuit court judge a "nigger bitch" (Amended Formal Complaint, ¶ 4), and another a "little Jew whore" (*Id.*, ¶ 12). Other alleged comments about identifiable people included calling a co-worker a "pushy nigger" (*Id.*, ¶ 1), telling Tarjeft he had "nigger blood" (*Id.*, p. 2), and referring to a campaign supporter as an "asshole black" and "black nigger"

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[5] The amendment added ¶ 13 which charged Petitioner with using racial or ethnic slurs in conversations with two former friends, John Roche and Sue Radulovich. These charges were later dismissed. The amendment also alleged that Petitioner used the word "nigger" in the presence of her children. The Master found that Petitioner once used the word in her son's presence.

[6] Meanwhile, Petitioner had filed her federal action against the Free Press and Tarjeft. She alleged that telephone conversations had been illegally taped, but did not disclose which conversations were taped, or the content of those conversations. At a press conference regarding the federal suit, Petitioner claimed that the tapes were "fake". This was alleged to be an actionable mis-representation.

(*Id.*, ¶ 7). The remaining charges involved use of the word "nigger", or a variation, without reference to any particular individual. It is undisputed that all of the pleaded statements were made by Petitioner from the privacy of her own home, in conversations with her ex-husband only (with no third party listening in), which Petitioner did not share with or disclose to anyone other than Tarjeft.

Petitioner filed a pre-trial motion to dismiss, arguing that the First Amendment did not permit state-imposed discipline based on the content of private conversations (Tr. 8/21/97, pp. 19-20, 36-38). The Master denied this motion, holding that Michigan procedures did not allow her to dismiss the action on First Amendment grounds (A1-A4).

At the same hearing, Petitioner sought dismissal on the ground that the tapes were made by Tarjeft in violation of 18 U.S.C. § 2511(1)(a) and (b), that further use or disclosure would violate 18 U.S.C. § 2511(1)(c) and (d), and that 18 U.S.C. § 2515 barred use of the tapes and evidence derived therefrom (Tr. 8/21/97, pp. 26-30, 36). Alternatively, Petitioner asked for a pre-trial evidentiary hearing under 18 U.S.C. § 2518(10)(a) to prove that the tapes were made in violation of Title III (Tr. 8/21/97, p. 43). The Master denied both motions, concluding that an evidentiary hearing would be "to[o] cumbersome" (Tr. 8/21/97, p. 43) (A4).

Petitioner later filed a formal motion for an evidentiary hearing. This motion was also denied by the Master (A8-A13).

Then, Petitioner filed an action for superintending control in the Michigan Supreme Court, seeking pre-trial review of the First Amendment and Title III questions. That motion was denied by the Supreme Court (A14).

Petitioner continued to assert her claims under the First Amendment and Title III. She did so at the trial, in her trial brief, and in her objections before the JTC and Michigan Supreme Court.

During the course of trial, argument was held on the admissibility of the tapes and evidence derived therefrom

(Tr. 10/3/97, pp. 103-125). The Master ruled that even if the tapes were made for tortious or criminal purposes, they would be admitted and considered (Tr. 10/3/97, pp. 119-120). This ruling was made on two grounds: the special truth-seeking character of JTC proceedings made § 2515 inapplicable, and (assuming that the tapes were voluntarily provided by Tarjeft), Tarjeft's illegality did not preclude the Government's use of the tapes once the JTC acquired them[7] (A16-A32).

Thereafter, the Examiner played a portion of a tape, and sought Petitioner's comment (Tr. 10/3/97, pp. 146-158). She declined to answer, citing § 2515 and this Court's decision in *Gelbard* (A33-A34). The Master held Petitioner in contempt (A35-A40; A41-A47), and entered an order precluding Petitioner from presenting evidence regarding the tapes (A48-A49).

The Examiner then filed a Second Amended Complaint (A128-A131). It charged that Judge Ferrara "refused to testify on October 3, 1997, in response to a question of the Examiner, without justification and after being ordered to testify by the Master" (¶ 4).[8]

After the Examiner rested, Petitioner began to present her case. In the main, she undertook to show that she had friends of all races and nationalities, treated kindly African-American friends and acquaintances, and had never discriminated in her personal dealings or judicial conduct.[9]

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[7] The Examiner relied on *United States v. Murdock*, 63 F.3d 1391 (6th Cir. 1995) as establishing a "clean hands" or "silver platter" doctrine. Petitioner relied on this Court's decision in *Gelbard v. United States*, 406 U.S. 41 (1972), but the Master believed that *Gelbard* was not binding in the Sixth Circuit (Tr. 10/3/97, p. 118). Petitioner argued unsuccessfully that these tapes, unlike those in *Murdock*, were obtained by the JTC through governmental compulsion. Petitioner also relied on cases from other Circuits which rejected any "clean hands" exception. *United States v. Vest*, 813 F.2d 477, 479-481 (1st Cir. 1987); *In re Grand Jury*, 111 F.3d 1060, 1077-1079 (3rd Cir. 1977); and *Chandler v. United States Army*, 125 F.3d 1296 (9th Cir. 1997).

[8] This amendment also charged that Respondent requested her son to impair or destroy evidence (¶ 3), but this charge was ultimately found meritless.

To that end, Petitioner presented Avela Smith as her first witness (A140-A152). She was an uneducated African-American woman who Petitioner (then a stranger) drove home to a poor section of Detroit when Ms. Smith was stranded at a political rally. After the publicity surfaced, Ms. Smith contacted Judge Ferrara to offer her assistance.

On direct examination, Ms. Smith related Petitioner's kindness. She testified that she had contacted the media (Tr. 10/27/97, pp. 6-8) (A143-A145). Ms. Smith also testified that a letter had been written to a local newspaper in defense of Judge Ferrara, but the letter had not yet been publicized (Tr. 10/27/97, p. 11) (A147-A148). The thoughts were hers, but the writing was that of another because her handwriting was hard to read (Tr. 10/27/97, pp. 11, 14) (A147, A150). The writing itself (A138-A139) was in the printing of Judge Ferrara, with Ms. Smith's cursive signature and address.

When Petitioner offered the writing,[10] the Examiner interrupted the direct examination for *voir dire*. During

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[9] The provision of the Michigan Code of Judicial Conduct applicable to issues of race is Canon 2 B which states that a judge should "*treat* every person fairly" "[w]ithout regard to a person's race, gender, or other protected personal characteristics" (emphasis supplied). This Canon is based on an ABA model in which a proposed commentary that would ban racial speech alone was rejected. See Abramson, *Canon 2 of the Code of Judicial Conduct*, 79 Marq. L. Rev. 949, n. 15 (1996). Additionally, M.C.R. 9.205(C)(7) makes it "misconduct" for a judge to "*trea[t]* a person unfairly, discourteously, or disrespectfully because of the person's race . . . " (emphasis supplied). As discussed, *infra*, the absence of discriminatory conduct has profound First Amendment significance. For these reasons, proof of non-discriminatory treatment was a foundation of the defense. Petitioner prevailed on this point.

[10] Over Petitioner's objection, the Master had previously admitted newspaper articles, letters, and opinions adverse to

voir dire, Ms. Smith testified that Judge Ferrara was the scrivener, and that it had been prepared about two weeks before (Tr. 10/29/97, p. 12) (A149). The Examiner's objection to the proposed exhibit was sustained.

After this testimony, the Examiner, again over Petitioner's objection, was allowed to file a Third Amended Complaint (A132-A137). In substance, this amendment claimed that it was fraud and an obstruction of justice for Petitioner's counsel to offer the Avela Smith letter and the witness's direct examination testimony, without first eliciting the date of the writing and Petitioner's role in writing it at Ms. Smith's behest.

Petitioner later recalled Ms. Smith to the stand. Without objection, the Master admitted a separate writing of Ms. Smith, offered to verify that her penmanship was deficient, hence the need for a scrivener (A153-A161).

After the close of proofs, the Master issued her Report. The Master recounted the evidence and concluded that Petitioner had not engaged in discriminatory conduct (Report, pp. 13-15) (A50-A69). Nonetheless, she found that Petitioner made the statements attributed to her, and that this constituted actionable misconduct (*Id.*, pp. 8, 11, 18-21).

In reaching this conclusion, the Master noted Petitioner's reliance on 18 U.S.C. § 2515 and Judge Ferrara's repeated efforts to exclude the tapes, and the evidence derived therefrom (*Id.*, pp. 3, 4). She believed that the tapes had been supplied to the Judicial Tenure Commission "unasked for" (*Id.*, pp. 3, 4). With that premise, she concluded that § 2515 was inapplicable under the principles of *Murdock* (*Id.*, p. 4). The Master also opined that, because of her status as a judge, Petitioner's privacy rights were diminished (*Id.*, p. 18).

Having admitted the tapes that supposedly showed otherwise, the Master found that Judge Ferrara's claim, at

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Petitioner The proposed exhibit was offered in response to that evidence.

a news conference, that the tapes were "fake", constituted misconduct (*Id.*, pp. 8, 22). This was characterized as "public misrepresentation" (*Id.*, pp. 8, 22).

The Master did not directly address Petitioner's First Amendment argument. She did, however, conclude that Petitioner was being punished for speech, not conduct, and for the adverse reaction of others to the content of her conversations with Tarjeft (*Id.*, pp. 18-20).

The Master acknowledged Petitioner's reliance on *Gelbard* (*Id.*, p. 4). The Master nonetheless concluded that Petitioner's refusal to answer a question based on the tapes "was without legal justification" (*Id.*, p. 12), constituted contempt and was judicial misconduct (*Id.*, pp. 21-22).

In the Master's view, Avela Smith testified honestly about the roles of herself and Judge Ferrara in drafting the letter (*Id.*, p. 17). She harbored doubts over whether, without the interruption of *voir dire*, Petitioner's counsel would have elicited evidence of the letter's "recent vintage" or Petitioner's identity as the writer (*Id.*, p. 17). This was deemed misconduct (*Id.*, pp. 17, 21-22), characterized as a "spurious letter", "fabrication of evidence, fraud and obstruction of justice" (*Id.*, pp. 21, 22).

On review, the Judicial Tenure Commission issued its Decision and Recommendation for Order of Discipline (A70-A74). It acknowledged that the tapes had been procured by subpoena (Decision, p. 2, ¶ 2), but did not address the Title III implications of the Master's error. Indeed, the Decision did not cite or address any of Petitioner's arguments. The Commission essentially upheld the Master's findings that Petitioner was guilty of misconduct for: her racial slurs; "publi[c] misrepresentation that the tapes were 'fake' "; "attemp[t] to perpetuate a fraud upon the court in the form of a fabricated letter" constituting "fabrication of evidence and obstruction of justice"; and her conduct during the formal hearing (Decision, p. 3).[11]

On review, the Michigan Supreme Court affirmed and ordered that Petitioner be removed from office (A75-A104). A two-judge concurring opinion would remove Petitioner solely for the Avela Smith letter (A102-A104).

The five-judge majority took a different tack. The Court concluded that removal was warranted only because of the totality of misconduct it found [Opinion, p. 2, fn. 3 ("in view of the egregiousness of respondent's conduct"), 10 ("Our decision is based on the nature, extent, and frequency of the misconduct")].

The Court did not review Petitioner's First Amendment or Title III arguments on the merits because, it claimed, the tapes and language were not considered (Opinion, pp. 3, 4, 11). Nonetheless, without addressing the federal claims, the Court quoted the content of the tapes reported in the media (Opinion, pp. 5, 6), and expressly found that Petitioner made the statements ("the contents of the tapes contai[n] racial and ethnic slurs made by [Judge Ferrara]"; "the racial and ethnic slurs made by respondent") (Opinion, pp. 2-3). The Court lambasted a judge who made those "highly inflammatory" statements as unworthy of public office because of "harboring and communicating such revolting views" (Opinion, p. 4).

The Court found that Respondent committed misconduct in stating that the tapes were "fake" (Opinion, pp. 14-15), and by refusing to answer the question (Opinion, pp. 27-28). The Court did not attempt to harmonize these findings with its failure to consider the § 2515 defenses offered by Petitioner in response to those charges. Nor did it expressly consider the federal implications of finding Petitioner culpable for her § 2515-based failure to admit that she made the statements (Opinion, pp. 15-18).

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[11] Other than the Avela Smith matter, discussed separately, the only charged conduct which occurred during the hearing was Petitioner's refusal to answer a question based on the tapes. Since that event was not addressed otherwise by the Judicial Tenure Commission, except for a blanket affirmance of all the Master's findings and evidentiary rulings (Decision, p. 1), the reference to conduct during the hearing must refer to the refusal to answer, the only pleaded allegation on point.

The Court concluded that the presentation of the Avela Smith letter was misconduct. This presentation was characterized as "obstruction of justice", and attempted "fraud on the court" (Opinion, pp. 24, 29).

In addition to these rulings, the Michigan Court cited as reasons for removal several matters which were not charged in any Complaint or litigated, and were often without evidentiary support. For example, Petitioner was condemned both for "interrupting opposing counsel and the master on several occasions" (Opinion, p. 26), and for failing to interrupt the direct examination of Ms. Smith ("Judge Ferrara's silence while Ms. Smith was cross-examined . . . shows a lack of candor with the tribunal") (Opinion, p. 24). She was damned for introducing a second letter, dated and handwritten by Ms. Smith, which was offered, and admitted without objection, for the limited purpose of showing her penmanship (Opinion, pp. 25-26). Petitioner was deemed to have committed misconduct by failing to directly admit having said the words, even though her knowledge was derived from listening to the tapes whose legality was being litigated (Opinion, pp. 17-18, fn. 13). Even though the Master had refused to allow testimony from Mr. Maul regarding a "bug" (see Report, p. 15; Tr. 11/5/97, pp. 102-117), and excluded what purported to be a report on that subject (Tr. 11/6/97, pp. 83-88, 104-116), Petitioner was condemned for this exchange (Opinion, p. 27).

Petitioner filed a timely Motion for Rehearing. In pertinent part, she contended that the Court's finding that Petitioner made the statements, its finding that Petitioner's "fake" comment was false, and its finding that Petitioner was unjustified in refusing to answer all questions, hinged on the Title III issues. She also pointed out the due process implications of the Court's retroactive re-definition of obstruction of justice and its removal of Petitioner for conduct which was never charged against her.[12] And, Petitioner explained the due process problems with a procedure by which the charges were amended to charge her with statements that had already been made in defense to a different initial charge. The motion was denied (A105).

THE REASONS WHY CERTIORARI SHOULD BE GRANTED

(1) Overview

The State has justified the use of procedures here in issue as vindication of its right to oversee the judiciary and remove elected judges. In the most general sense, that interest is undeniable. In this case, that rationale conflicts with established federal and constitutional rights. This Court has not addressed whether, or to what extent, those who seek or obtain judicial office thereby forfeit the protections afforded by Title III, the First Amendment, and the due process guarantees of the Fourteenth Amendment. In an era marked by vitriolic attacks on elected officials, this Court should address the undecided interplay between federal rights and judicial removal actions [see Sup. Ct. Rule 10(c)].

In this case, the State has concluded that judicial tenure proceedings are of a unique character, and therefore beyond the application of Title III. That view finds no support in the language of § 2515, which applies to "any trial, hearing, or other proceedings in or before any court, grand jury, department, officer, agency [or] regulatory body . . . or other authority of . . . a State, or a political subdivision thereof . . . ". Nor does the State's view square with § 2511(1)(c) and (d) which separately prohibit use and disclosure. This Court should grant certiorari to determine whether the supremacy clause allows a State to hand-carve a judge-made exception to Title III [see Sup. Ct. Rule 10(c)].

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[12] Where, as here, the state court decision provides a new construction which first gives rise to the federal question, a motion for rehearing setting forth the federal grounds amply reserves the issue for review by this Court. *Herndon v. Georgia*, 295 U.S. 441, 444 (1935); *Great Northern Arco v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 367 (1930); *Missouri v. Gehner*, 281 U.S. 313, 320 (1930).

Similarly, the Michigan tribunals have adopted a "clean hands" or "silver platter" doctrine, which permits Government to use or disclose illegal tapes which it did not create initially, but obtained by subpoena. Certiorari should be granted to resolve the conflict between the decisions below and those of the federal circuit courts which have expressly rejected that very doctrine [see Sup. Ct. Rule 10(b)].

The State has declared that Petitioner's invocation of § 2515 and *Gelbard* is a basis for removal. Its conclusion that the principles of *Gelbard* are available only to those charged with a crime is at odds with *Gelbard*. Certiorari should be granted to review this unprecedented limitation of *Gelbard* [see Sup. Ct. Rule 10(c)].

Likewise, the Court should review the conclusion below that the Government may punish private speech, including epithets directed toward public officials, on the basis of its content. And, the State has decreed that its procedures do not permit a pre-trial challenge based on First Amendment rights. The Court should take the opportunity to consider whether elected judges retain the free speech rights afforded by the First Amendment [see Sup. Ct. Rule 10(c)].

The ordinary paradigm for American justice requires the charging party to first articulate the charges, then conduct a trial on those charges, based on the legality of the conduct when it occurred. The Michigan procedure, as applied in this case, is a radical departure from that paradigm. The State has first conducted a hearing, then charged Petitioner with testimony offered before the charge was made, then removed her from office through a retroactive construction of "fraud on the court" and "obstruction of justice" at odds with the settled meaning of those terms existing at the time of the relevant conduct. She has been removed for conduct which was never charged against her, without notice or an opportunity to be heard. Certiorari should be granted to review the apparent conflict of that approach with this Court's due process jurisprudence, and to review the applicability of Fourteenth Amendment protections to State judicial removal proceedings [see Sup. Ct. Rule 10(c)].

Since Title III was enacted, there has been a proliferation of high technology, much of which can interfere with privacy generally, some of which may be readily used for interceptions which violate Title III. The threat to privacy is greater now than at any other time in our Country's history. The ongoing vitality of Title III's protections is of great public moment.

This is especially so where public officials are involved. In these highly partisan times, it has become routine to look for "dirt" to discredit a political opponent. The temptation to do so through means prohibited by Title III is considerable, particularly if those who use and disclose illegal interceptions by others are insulated from accountability. All too sadly, the net result is to sway highly talented people to shun public service to avoid the incursions on privacy which have become commonplace. Where an elected official is forcibly removed, the electorate has effectively been disenfranchised. The need for this Court's guidance cannot be ignored.

(2) The Question Whether Title III Applies To State Judicial Tenure Commission Proceedings Presents A Substantial Constitutional Issue.

This history and intent behind Title III were reviewed in *Gelbard*, 408 U.S. at 46-52. At bottom, § 2515 was enacted "to protect effectively the privacy of wire and oral communications, [and] to protect the integrity of court and administrative proceedings" (408 U.S. at 49).

The Court stressed that Title III not only forbids the initial interception, but also forbids use or disclosure which would victimize one anew (408 U.S. at 51-52).

The Master opined that Title III applied only to criminal actions. Nothing could be further from the truth. The Senate Report, quoted in *Gelbard*, 408 U.S. at 50, fn. 9, provides, "[§ 2515] is not limited to criminal proceedings." In *Gelbard*, the Court noted that § 2515 restricts governmental authority to "fin[d] a person in civil contempt for failing to cooperate with the prosecutor" (408 U.S. at 52).

Intrinsic to the protection afforded by Title III is the guaranteed opportunity to file a pre-trial motion to suppress, § 2518(10)(a).[13] The salutary purpose is to withhold further use and disclosure until a court has examined whether the interception was unlawful. *United States v. Manuszak*, 438 F.Supp. 613, 618-621 (E.D. Pa., 1977). If so, further use and disclosure are averted and, if there is no independent evidence, the accused may be spared the rigors and jeopardy of a trial.[14] Where a facially sufficient claim is made that the interception violated Title III, an evidentiary hearing is required. *Manuszak, supra*, 438 F.Supp. at 621; *United States v. Losing*, 539 F.2d 1174, 1177 (8th Cir. 1976). See also *United States v. Cantu*, 625 F.Supp. 656, 662-665 (N.D. Fla., 1985).

The sole reason the State denied Petitioner an evidentiary hearing was that it would be "to[o] cumbersome".

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[13] Section 2518 has been characterized as "provid[ing] the remedy for the right created by section 2515" (Sen. Rep. No. 1097, quoted in 1968 USCCAN 2195).

[14] In the federal case, Tarjeft, the only other participant, testified that he did not recall the 1992-1993 conversations until he again listened to them in 1996. Similarly, Petitioner swore that she did not recall the conversations, and that the only knowledge she had on the subject was derived from listening to the excerpt tape. As all supporting evidence was "derived" from the interception, excluded under § 2515, application of § 2518(10)(a) would have led inexorably to outright dismissal.

No federal court has ever embraced the view that a State may ignore Title III because it deems the federal statute inconvenient to follow. On the contrary, the supremacy clause requires that state interests like "convenience" be subordinated to the controlling provisions of federal law. See *Free v. Bland*, 369 U.S. 663, 666 (1962); *Hamm v. Rock Hill*, 379 U.S. 306 (1964); *Perez v. Campbell*, 402 U.S. 637, 651-652 (1971); *Nash v. Florida Industrial Commission*, 389 U.S. 235, 240 (1967).

For similar reasons, it is dubious that the State can permissibly hand-carve a "judicial tenure" exception to § 2515. The *Gelbard* Court found that § 2515 was enacted in "unequivocal language" (408 U.S. at 47), as a result of "congressional findings [which] articulate clearly the intent to utilize the evidentiary prohibition of § 2515" (*Id.*, p. 49), whose "importance as a protection for 'the victim of an unlawful invasion of privacy' could not be more clear" (*Id.*, p. 50; footnote omitted). The language of § 2515 is all-encompassing, and plainly includes State administrative actions like Michigan's judicial tenure proceedings.

As a principle of statutory construction, this Court has repeatedly recognized that a court must apply a federal statute in accord with its plain language, resisting the temptation to impose a judicial exception that Congress decided not to include. The supremacy clause does not permit a State to arrogate to itself the authority which this Court is denied to create *ad hoc* judge-made exceptions to a clear federal statute.

The Master apparently succumbed to the Examiner's position that, "Judges are worse than criminals when they seek to obstruct the truth from being known" (Tr. 10/3/97). One may question the proposition that judges accused of using bad words are, in some subjective sense, "worse" than terrorists, assassins, drug dealers, and other "criminals" who may avail themselves of § 2515. Exclusionary rules, by their very nature, exclude evidence, necessarily "obstruct[ing] the truth from being known". All of this aside, it was for Congress to decide whether the unavailability of evidence is an appropriate price to pay for protecting citizens from being re-victimized by the use and disclosure of evidence which exists only because of the interceptor's illegal conduct. It is not for a State to second-guess the wisdom of the Congressional calculus.

This "silver platter" or "clean hands" doctrine is not even supported by *Murdock*. There, the evidence was truly given over voluntarily, unlike here, where it was obtained by governmental compulsion. The State decision is completely inconsistent with the federal appellate courts that have correctly held that §§ 2511(1)(c) and (d) and § 2515 forbid governmental use of criminally obtained evidence, even without Government culpability for the separate illegality of the interception itself. *United States v. Vest*, 813 F.2d 477, 479-481 (1st Cir. 1987); *In re Grand Jury*, 111 F.3d 1060, 1077-1079 (3rd Cir. 1997); *Chandler v. United States Army*, 125 F.3d 1296 (9th Cir. 1997).

The propriety of certiorari is not undermined by the Michigan Supreme Court's failure to consider Petitioner's Title III arguments. The Court removed Petitioner for conduct which could not be actionable if Title III applied. To have reached its decision, it had to implicitly reject Petitioner's federal arguments.[15]

For example, the Michigan contempt statute, much like the federal contempt statute addressed in *Gelbard*, is directed only at parties and witnesses who disobey a "lawful" order, or refuse to answer "any legal and proper interrogatory", M.C.L.A. 600.1701(g), (i). As *Gelbard* makes clear, § 2515 forbids holding in civil contempt one who lawfully exercises the rights conferred by Title III. Petitioner could not be deemed in "contempt" if *Gelbard* and § 2515 were deemed applicable.

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[15] Notions of "waiver" were suggested by the Examiner, but not relied on by the State decision-makers. Plainly nothing that occurred at trial constituted "waiver", because Petitioner had already preserved a standing objection to the tapes and evidence derived therefrom. Moreover, the federal suit which she filed did not identify *which* conversations were unlawfully intercepted (there were an estimated 180 taped conversations), much less their *content*. The proposition that assertion of Title III rights constitutes waiver of those very rights does not warrant further discussion.

Likewise, Petitioner was condemned for stating that the tapes were "fake". The only evidence to support the critical element, falsity, was the tapes themselves, or the conclusions derived from the tapes by those who listened to them. Unless this evidence was allowed by Title III, the charge was factually untenable.

The Michigan Supreme Court condemned Petitioner for her failure to directly admit that she said what the tapes reported. Having no independent knowledge, any direct response which Petitioner could give would be derived from the tapes, whose admissibility under § 2515 she continued to challenge. In this respect as well, the removal of Petitioner hinges on the correctness of her invocation of the federal rights founded in § 2515 and *Gelbard.*

(3) The Question Whether A State Can Impose Discipline For The Content Of Private Conversations Is A Substantial Constitutional Issue.

At the outset, it is important to stress what this case does *not* involve. It does not involve a public communication which intrudes on the privacy of others or foists itself on an unwilling listener [compare *Cohen v. California,* 403 U.S. 15 (1979) and *Erzoznik v. City of Jacksonville,* 422 U.S. 205 (1975)]. The words were not confrontational "fighting words", publicly uttered with the intent to provoke violence [compare *Choplinsky v. New Hampshire,* 315 U.S. 568 (1942) and *Brandenburg v. Ohio,* 395 U.S. 444 (1969)]. Nor were they obscene [compare *Cohen* and *Roth v. United States,* 354 U.S. 476 (1957)].

Instead, the words were uttered in private conversations, from the sanctity of Petitioner's own home, with a single willing listener, her ex-husband. As the Master recognized, the case entails "speech" alone, not "conduct". Moreover, the charges against Petitioner were based on the *content* of the speech; that the words used were offensive to others' sense of political or linguistic correctness.

At its very core, the First Amendment protects against governmental retaliation based on the content of speech. That Amendment, applicable to the States by operation of the Fourteenth Amendment, would unquestionably apply if Petitioner were not a judge.

Here, for example, Petitioner was charged with criticizing two public officers as a "nigger bitch" and a "little Jew whore". Under this Court's settled jurisprudence, criticism of a public official, in hyperbolic epithets which defy objective truth or falsity, are not sanctionable. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990). As to the charge that it was sanctionable to use the words "Arabs" or "nigger", even the public expression of foul language is protected from state incursion. *Cohen, supra; Collins v. Smith*, 578 F.2d 1197 (7th Cir. 1978) (racial hate speech is constitutionally protected).

To be sure, States have a legitimate interest in punishing discriminatory *conduct* by a judge, but here there was none. Whether a purported state interest in regulating private speech of judges trumps First Amendment rights is an altogether different question. In a related context, this Court has intimated that the State interest in regulating attorneys does not justify withholding attorney status on the basis of protected First Amendment conduct, *Schware v. Board of Bar Examiners*, 353 U.S. 232, 243-246 (1957) (past membership in Communist Party). The issue of whether otherwise protected speech may be penalized when made by a judge is an unanswered one. That question should be considered by this Court.

The Michigan procedures have been construed as forbidding dismissal based on the First Amendment. Except for that quaint procedure, the Master would have been required to apply the United States Constitution and, if Petitioner's First Amendment argument was meritorious, dismiss the action. It is the Michigan procedure foreclosing pre-trial First Amendment review which permitted the proceedings that culminated in Petitioner's removal.

The abstract First Amendment protection against speech-based discipline is not self-effectuating. That protection is rendered worthless without an available procedure for vindicating constitutional rights. The Michigan scheme for disciplining judges, without a pretrial procedure to decide First Amendment claims, raises substantial questions under the supremacy clause, the First Amendment, and the Fourteenth Amendment.

(4) The Question Whether Michigan Judicial Tenure Procedures Comport With Due Process Requirements Under The Fourteenth Amendment Is Substantial.

This Court has not decided whether a judge, in removal proceedings, enjoys the due process protections of the Fourteenth Amendment. It has, however, recognized that State proceedings regarding attorneys must comply with due process requirements. *Schware, supra; Willner v. Committee on Character and Fitness,* 373 U.S. 96, 103 (1963). The Court should consider whether, and to what extent, due process requirements apply to judicial removal actions. This is especially so since the proceedings below are woefully deficient under ordinary due process principles.

a. The Use Of Evidence In A Fashion That Precludes The Accused From Offering Evidence.

The tapes were presented without authentication. As a result, Mr. Tarjeft was not presented as a witness by the Examiner. By the time Petitioner began her case, an Order had been entered precluding her from offering evidence regarding the tapes. With the Master's refusal to permit an evidentiary hearing, Petitioner was denied the opportunity to offer any evidence regarding the very source of the charges against her.

It is true that the order precluding evidence was issued as a result of Petitioner's refusal to answer whether she recalled hearing a snippet of one conversation. If, as we submit, Petitioner's position was justified under *Gelbard*, the order precluding evidence must fall as well. Moreover, even if the refusal to answer is regarded as unjustified, the only arguable impact was to impair the Examiner's ability to prove the single charge based on *that* tape, not to impair his ability, and obligation, to prove the other tape-related charges.

Notably, the Master admitted the tape cassettes into evidence without *ever* allowing Petitioner or her counsel to listen to the entirety of the physical exhibit.[16] The Master found Petitioner guilty of one charge, based on a tape that Tarjeft never produced, without allowing inquiry as to why it was not produced. The net impact of the Michigan procedure is to allow reliance on evidence in a fashion that disables the accused judge from showing that the facts are different from what the evidence reflects. Such rules, which operate to deprive a litigant of the means necessary to sustain her defense, are violative of due process guarantees. *Ferguson v. Georgia*, 365 U.S. 570 (1961); *Chambers v. Mississippi*, 410 U.S. 284 (1973). See also *United States v. Nixon*, 418 U.S. 683 (1974) and the plurality opinion of Justice Marshall in *Jenkins v. McKeithen*, 395 U.S. 411 (1969). As stated in *Bowman Transportation, Inc. v. Arkansas Best Freight System, Inc.*, 419 U.S. 281, 288, fn. 4 (1974), "The Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation."

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[16] The cassettes included both Tarjeft's conversations with Petitioner and those with his children on the same day or nearly the same day. Petitioner filed a motion, seeking to listen to the entire content of the exhibit, but the Master denied this motion, instead allowing Petitioner to listen only to the Tarjeft-Petitioner conversations on which charges were based.

b. The *Ex Post Facto* Re-Definition Of "Obstruction Of Justice" And "Fraud on the Court" To Justify Removing Petitioner For The Avela Smith Letter.

In the direct examination of Ms. Smith, Petitioner's counsel elicited that the letter had been penned by another, at Ms. Smith's request, and had not yet been published. Before direct examination was interrupted by *voir dire*, Petitioner's counsel did not amplify this testimony to identify the name of the scrivener or its date. For this, Petitioner was found to have "obstructed justice" and attempted to perpetrate a "fraud on the court".

Implicit in this ruling is the notion that a party whose attorney presents a witness must elicit on direct examination all testimony which might detract from the witness's testimony. Until the decision in this case, no Michigan decision even remotely suggested the existence of this "obligation". Indeed, that notion is at odds with an adversarial system of justice in which each side elicits evidence thought favorable, leaving it to the opposing attorney to elicit, in cross-examination, testimony favoring the other side. Michigan's unprecedented departure from longstanding courtroom procedure – in a case where the witness's testimony was unquestionably truthful, and where the fact that she did not pen the letter and that it was not yet published were elicited, albeit not comprehensibly – is remarkable indeed.

In *People v. Thomas,* 438 Mich. 448, 457-458; 475 N.W.2d 288 (1991), the Supreme Court upheld dismissal of the charge that a police officer engaged in "obstruction of justice" by falsifying a police report. The Court held that the term refers to twenty-two separate offenses classified in Blackstone, Commentaries, 161-177 (1890) (*Thomas,* 438 Mich at 457-458, fn. 5). As the *Thomas* Court held, "To warrant the charge of obstruction of justice, defendant's conduct must have been recognized as one of the offenses falling within the [Blackstone compiled] category".

The conduct of Petitioner does not come close to any of the 22 separate offenses defined by the Michigan term "obstruction of justice". This was the state of the law during Petitioner's trial. The evidence offered from Ms. Smith simply did not constitute "obstruction of justice" under Michigan law at the time it occurred.

Nor did it constitute "fraud on the court" under then-existing Michigan law. That term is defined as occurring "when some material fact is concealed from that court or when some material misrepresentation is made to that court", *Banner v. Banner*, 45 Mich. App. 148, 154; 206 N.W.2d 234 (1973). The term covers a wife's concealment during a divorce case that she is pregnant by another man [*DeHaan v. DeHaan*, 348 Mich 199; 82 N.W.2d 432 (1957)], or the filing of a false probate court account [*Burnham v. Kelley*, 299 Mich. 452, 460; 300 N.W. 127 (1941)]. However, a partial disclosure, accurate as far as it goes, does not constitute "fraud on the court" [*Young v. Young*, 342 Mich. 505, 509; 70 N.W.2d 730 (1955) (alleged failure to disclose all assets)]; *Banner, supra* (no "fraud on the court" for withholding proof of reconciliation where possible reconciliation was mentioned and no further inquiry was made). Moreover, to be actionable, a concealment must be material to the ultimate outcome, *Baum v. Baum*, 20 Mich. App. 68, 72-73; 173 N.W.2d 744 (1969).[17]

At bottom, the Michigan Supreme Court has redefined "obstruction of justice" and "fraud on the court" to penalize conduct which was neither under the then existing law. This Court has recognized that unforeseeable judicial enlargement of a criminal statute, to reach conduct not previously forbidden, offends the principles which bar *ex posto facto* legislation, and violates due process guarantees. *Marks v. United States,* 430 U.S. 188, 191-192 (1977); *Bouie v. Columbia,* 378 U.S. 347, 350-353 (1964); *Rabe v. Washington,* 405 U.S. 313 (1972).

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[17] The date of the letter and the identity of the scrivener were not even critical to evidentiary admissibility, much less material to the outcome of the case.

c. The "Trial First – Charge Later" Feature Of Michigan Procedure.

This case involves initial charges deficient under Title III and the First Amendment, used as a springboard to hale Petitioner to trial, then use her defenses to the initial charge to level new accusations based on her prior trial conduct. At the very heart of the "due process" guaranteed by the Fourteenth Amendment is fair *advance* notice of the charges. The practice of holding a bar disciplinary hearing on one charge, then disciplining the accused for previously uncharged conduct arising from the hearing, was roundly criticized by this Court in *In Re Ruffalo*, 390 U.S. 544, 550-552 (1968):

> "In the present case petitioner had no notice that his employment of Orlando would be considered a disbarment offense until *after* both he and Orlando had testified at length on all the material facts pertaining to this phase of the case. As Judge Edwards, dissenting below, said, 'Such procedural violation of due process would never pass muster in any normal civil or criminal litigation.' 370 F2d, at 462" (emphasis in the original; footnote omitted).
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> * * *
>
> "The charge must be known before the proceedings commence. They become a trap when, after they are under way, the charges are amended on the basis of testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh" (footnote omitted).

* * *

> "This absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process."

d. Removing Petitioner For Conduct Not Alleged To Be Misconduct In Any Complaint.

The removal grounds cited by the Michigan Supreme Court included many findings which were never alleged in any Formal Complaint or litigated. This procedure is also constitutionally deficient.

In Michigan bar disciplinary proceedings, the State Supreme Court has had no difficulty discerning that the core due process guarantees – notice of the charges and an opportunity to be heard – are violated when an attorney is disciplined for conduct which has never been charged. *State Bar v. Fried*, 388 Mich. 711, 715; 202 N.W.2d 692 (1972); *State Bar v. Jackson*, 390 Mich. 147, 155; 211 N.W.2d 38 (1973) (citing *Ruffalo*); *State Bar v. Corace*, 390 Mich. 419, 425; 213 N.W.2d 124 (1973). Other courts have reached the same conclusion. See *Office of Disciplinary Counsel v. Simecek*, 699 N.E.2d 933 (Ohio, 1998); *Committee on Professional Ethics and Conduct v. Wenger*, 454 N.W.2d 367 (Iowa, 1990).

In *Rabe, supra*, 405 U.S. at 315, the Court eloquently addressed this very point:

> " 'It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made.' *Cole v Arkansas*, 333 US 196, 201, 92 L Ed 644, 47, 68 S Ct 514. Petitioner's conviction cannot, therefore, be allowed to stand. *Gregory v. City of Chicago*, 394 US 111, 22 L Ed 2d 134, 89 S Ct 946; *Garner v Louisiana*, 368 US 157, 7 L Ed 2d 207, 82 S Ct 248; *Cole v Arkansas, supra*."

Petitioner was never charged with culpability for the second Avela Smith letter (Opinion, pp. 25-26). She was never charged with misconduct for offering the testimony of Mr. Maul[18] (Opinion, pp. 26-27). No Complaint charged her with culpability for statements made at oral argument (Opinion, pp. 2-3, 15-17). No allegation was made that Petitioner was subject to discipline for "interrupting opposing counsel and the Master on several [unidentified] occasions" (Opinion, p. 26), or that her *failure* to interrupt the *voir dire* of Ms. Smith was also misconduct (Opinion, p. 24). Petitioner was not charged with "unnecessarily vague" testimony (Opinion, p. 27), much less given any notice of *what* testimony was thought to be so, or an opportunity to be heard on that point. There was no misconduct charge based on the fact that Judge Ferrara, "refused to divulge her [home] phone number" (Opinion, p. 28); at trial, the question was satisfactorily resolved by the stipulation that the telephone number on Tarjeft's phone bill was Petitioner's.

Undeniably, the Michigan Supreme Court removed Petitioner, at least in part, for conduct which was never charged or litigated. The due process violations inherent in that procedure are staggering.

WHEREFORE, Petitioner prays that this Honorable Court grant her Petition for Writ of Certiorari.

Respectfully submitted,

BENDURE & THOMAS

MARK R. BENDURE (P23490)
Attorneys for Petitioner
577 East Larned, Suite 210
Detroit, Michigan 48226-4392
(313) 961-1525

Dated: January 4, 1999

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[18] In this respect as well, removal violates the principle that a State may not use evidence in a way that prohibits a defense. Here, the Supreme Court damned Petitioner for offering proof of a "bug", yet forbade Petitioner the opportunity to prove that it *was*.

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Motion Hearing – 8/21/97 Denial of Motion to Dismiss and Motion for Evidentiary Hearing

* * *

[p. 40] THE COURT: Well, I've heard enough, I've heard enough. There are a number of things that I want to comment before I make my ruling.

The question of whether the offensive language was made is a question of fact to be decided by me, the Master in this hearing and the law.

I'm certainly troubled, I have some trouble because of these taped conversations. The motion to dismiss has raised questions of first amendment rights and while I will not take second chair to anybody in terms of asserting first amendment rights, it seems to be that the acceptance of a judicial position [p. 41] includes self-imposed restrictions relative to the exercise of first amendment rights. Clearly, clearly that can be challenged but every place that I have seen it challenged, the right has succumbed to the public right to have judges who are impartial triers of fact, etcetera.

The questions relative to the wire tap, the questions relative to the misrepresentations, the counts of the misrepresentations are questions of fact as is whether the language alleged to have been spoken was, in fact, spoken.

You have raised a question of lack of separate counts. Clearly, the issue raised in the complaint and the now amended complaint goes to whether or not certain offensive statements were made to one or more people and whether these statements were made. Those are all questions of fact. It may turn out that the taped telephone conversations become potentially made for illegal purposes but there is no finding of fact on that issue that has been made by me. I have had no testimony, I have had representations made and counter, you know, countered but I have come to no conclusion about this. I recognize that there is a potential but I have come to no conclusion about that nor can I in the context of this hearing.

So, in essence, I would deny the motion on the basis of what has been raised in the context of it. But I agree with my predecessors as Masters. I believe that my charge and I recognize that it is, my charge is a limited one, my charge is to decide questions of fact. I am merely the neutral persona of the Tenure Commission for purposes of fact finding.

And it is folly to suggest and Mr. Sobel mentioned this, it is folly to suggest that I have the authority, acting as the penumbra of the Commission [p. 42] to dismiss a complaint that has been authorized by the Commission. I just simply do not believe that the rules give me that authority. This is one of the principle distinctions between these proceedings and normal civil proceedings where such a motion is entirely appropriate. This is not necessarily a situation that I can disagree with or agree with. I think it's a situation that is, given the character of my position. This is something that could be again, as we've all said, this has never been examined by the Supreme Court but when you have these strange proceedings, I must look to what other minds have said in advance and see if I disagree with them and I find, in essence, that I do not just because of my odd position, although appointed by the Supreme Court, my duty, as I perceive it, is to assess the facts, resolve them, make a report that contains recommendations one way or the other.

So, I am compelled to deny your motion.

With those aspects of it that relate to the lack of separate counts, I'm troubled by the, was it paragraph 13, which mentioned the attorney Lawrence Stockler's representations that were allegedly made on behalf of Judge Ferrara. I can't really see that I can charge Judge Ferrara with those statements unless there is some fact finding that shows that she authorized the making of such statement. The fact that a count might be weaker than another count doesn't mean that it should not be considered but that goes, again, that goes again to issues of fact and not to whether or not the count should be there or not be there as I see it.

Mr. Sobel, I trust you will prepare an order consistent with all of this?

MR. SOBEL: Yes, your Honor.

[p. 43] MR. BENDURE: One quick question if I might, your Honor.

We had requested in our briefs minimally an evidentiary hearing with respect to the issue of wire taping because it seems to me that the federal exclusionary statute would exclude it's admission as substantive evidence. Certainly, you do have the authority to rule on the admissibility of evidence and, therefore, what we are asking for is an evidentiary hearing to enable us to provide the facts –

THE COURT: – No, I'm not going to allow an evidentiary hearing, I mean, I just think this is getting to cumbersome. If -- this issue can be raised at the hearing now scheduled for September 29 and we'll rule on these matters, I will rule on these matters as they arise during the context of the hearing.

* * *

STATE OF MICHIGAN

BEFORE THE MICHIGAN JUDICIAL
TENURE COMMISSION

COMPLAINT AGAINST:

HON. ANDREA J.
FERRARA
Judge, 3rd Circuit Court
Detroit, Michigan

_______________________/

FORMAL COMPLAINT
NO. 52

ORDER

THIS MATTER came before the Master on August 21, 1997, for hearing on Respondent's Motion to Dismiss Complaint and/or to Correct or Strike Non-Conforming Pleadings and the Judicial Tenure Commission's Motion for Leave to Amend Formal Complaint No. 52. At the time of the hearing, in addition to offering oral argument relating to the pending motions, Respondent's counsel and the Examiner made oral requests for other relief. After considering the records and files herein, the requests and arguments of counsel, being fully advised,

IT IS HEREBY ORDERED as follows:

1. Respondent's Motion to Dismiss Complaint and/or to Correct or Strike Non-Conforming Pleadings is denied in its entirety,

   a. Insofar as Respondent seeks dismissal of the Complaint, the Motion is denied for the reason that the Master is without authority to consider or grant a dispositive motion; and

b. Insofar as Respondent challenges the adequacy of the pleadings, the Motion is denied for the reason that the pleadings are adequate;

2. The Judicial Tenure Commission's Motion for Leave to File an Amended Formal Complaint is granted;

3. Respondent's oral Motions for a Limiting order and an Adjournment of the Hearing are denied;

4. Respondent's witness and exhibit lists shall be filed and served no later than August 29, 1997; provided, however, both Respondent and the Judicial Tenure Commission may file a list of witnesses and a list of exhibits pertaining exclusively to the amended portions of Formal Complaint No. 52 on or before September 5, 1997;

5. Respondent shall file and serve a verified Amended Answer to the original Complaint on or before August 29, 1997;

6. Howard Tarjeft shall make available for examination by Ed Primeau and Ted Lewis segment seven of the tape recordings on or before August 29, 1997;

7. Pre-hearing memoranda shall be filed on or before September 22, 1997; and

8. Respondent's request for a evidentiary hearing regarding the admissibility of the tapes is denied without prejudice.

This **Order** has been signed on this 3rd day of ~~August~~ September, 1997.

/s/ Vesta Svenson
HON. VESTA SVENSON,
MASTER

Approved as to Form:

/s/ Allan D. Sobel
Allan D. Sobel (P 40872)
Examiner

/s/ Mark R. Bendure
by ads per consent 8/28/97
Mark R. Bendure (P23490)
Attorney for Respondent
Judge Ferrara

Motion Hearing – 9/24/97
Denial of Motion for Evidentiary Hearing

* * *

[p. 31] witness list, as this hearing goes on, I am prepared to allow you to do it even though it's a witness of which we have had no notice until that time. What's fair is fair and I'm going to allow it to both of you. I think that's the only way that we're going to get this thing resolved.

I think have to stop talking about these tapes and in that context – I understand your position, I understand you position, Mr. Bendure, but part of this is just only so many words and there comes a point where you just have to stop.

MR. BENDURE: I understand that, can I be heard real quickly on the evidentiary hearing point?

THE COURT: Yes.

MR. BENDURE: We have the Federal statute which we think allows an evidentiary hearing and would suggest requires it. I don't know that it's going to cause any additional time in the overall scheme of things because, unless the Court would foreclose that objection all together, we would expect to get into it with the witnesses anyhow. It's just a question of whether we call Howard Tarjeft, for example, one day of evidentiary hearing testimony and one day of other testimony or whether we slop it all together in two days. So I'm not sure there is a time savings.

But there is something, I think, very important which is the Federal statute itself. I think the very purpose of that is to go through the process of the hearing in determining whether they were legally or illegally made in the first instance –

THE COURT: – Isn't there a case, actually, I have not completely [p. 32] read, I think it's in your brief, is it not, Mr. Sobel –

MR. SOBEL: – I would like to address that case that I think he may be referring to –

THE COURT: – A fair exhaustive disquisition on the tapes re: the Federal statute. Have you read that?

MR. BENDURE: Is that the silver plate case, that it's on a silver platter?

MR. SOBEL: It's the case of *United States v. Murdock.*

MR. BENDURE: Right.

THE COURT: I haven't read that, I haven't got that –

MR. SOBEL: Which basically holds that if a government agency, with clean hands, gets a lucky break and falls into possession of tape recordings, then whether they were made legally or illegally under the statute, does not effect [sic] admissibility, that the government is entitled to offer and have the tape recordings admitted into evidence because it has clean hands and is not to be effected [sic] by the statute which only intends to bar a wrongdoer from relying upon illegally –

THE COURT: – You know I haven't read that case. Isn't that a terrible case, Mr. Bendure?

MR. BENDURE: Well, it's contrary to the statute, it's also contrary to two other –

THE COURT: – Does it discuss the statute?

MR. SOBEL: It directly interprets the statute and, unfortunately, for Judge Ferrara, it is the law of this Circuit, it's a Sixth [p. 33] Circuit opinion decided initially in August of 1995 and then reviewed and confirmed after rehearing in bank (sic) in October of 1995 and that is the law of this Circuit. Unfortunately, while there may be for Judge Ferrara, while there may be opinions from other Circuits that view the law differently, this is the controlling legal precedent.

MR. BENDURE: We're certainly not, you're certainly not bound by Sixth Circuit authority.

THE COURT: Last time I checked the State of Michigan was in the Sixth Circuit.

MR. BENDURE: It was but certainly a State Court isn't bound by it. It is bound by the best interpretation of the Federal statute it can get. It's not like you are an Eastern District Court Federal Judge who would be bound by it any more than a Federal Judge –

THE COURT: – Mr. Bendure, I think you better not say anything more on the record about what I'm bound by. I think I am bound by a Sixth Circuit case on an issue that comes before me.

MR. BENDURE: It's contrary to the statute and the overwhelming weight of law and has since been criticized by the Sixth Circuit.

THE COURT: All right, I think we're done with everything I had to decide but I do need to see you folks in my office.

MR. SOBEL: Okay, Judge, just before we break, can I put on the record a few exhibits that I wanted to give to Mr. Bendure?

THE COURT: Sure.

MR. SOBEL: We want to, we were intending to introduce

* * *

STATE OF MICHIGAN

BEFORE THE MICHIGAN JUDICIAL
TENURE COMMISSION

COMPLAINT AGAINST:

HON. ANDREA J.
FERRARA
Judge, 3rd Circuit Court
Detroit, Michigan 48226

FORMAL COMPLAINT
NO. 52

______________________________/

ORDER

THIS MATTER came before the Master for a hearing on September 24, 1997, at which time the Examiner and Associate Examiner were present, and Mark R. Bendure appeared on behalf of Judge Ferrara. After considering the records and files herein, and the argument of counsel, being fully advised.

IT IS HEREBY ORDERED as follows:

1. The Examiner's Motion to Supplement Witness and Exhibit Lists is granted;

2. Unless Respondent provides the Examiner with copies of all medical records in the possession or control of each and every physician, hospital, or other custodian, from whom Respondent has received treatment for a mental condition since January 1, 1992, by no later than Tuesday, September 30, 1997, Respondent is barred from presenting or introducing any physical, documentary or testimonial evidence relating to her medical history or mental or physical condition at the time of the hearing;

3. The Examiner shall file and serve Respondent's counsel with a list of witnesses the Examiner actually intends to call at the hearing on September 25, 1997, by 5 p.m., and the Respondent shall file and serve the Examiner with a list of witnesses the Respondent actually intends to call at the hearing on September 26, 1997, by 5 p.m. The Master will consider requests to supplement these witness lists based on a showing of need to rebut evidence introduced during the hearing by the opposing party;

4. Respondent's Motion to Review Full Tapes, and to Review Tapes of Conversations of Howard Tarjeft with Respondent's Children, Sue Radulovich, or John Roche is denied;

5. Respondent's Motion to Compel Production of Tapes, to Dismiss for Noncompliance With order, or for Issuance of Order to Show Cause is denied; and

6. Respondent's Motion for Evidentiary Hearing is denied.

This **Order** has been signed on this 29th day of September, 1997.

/s/ Vesta Svenson
HON. VESTA SVENSON,
MASTER

ORDER Michigan Supreme Court
Lansing, Michigan

Conrad L. Mallett, Jr.
Chief Justice

James H. Brickley
Michael F. Cavanagh
Patricia J. Boyle
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Justices

Entered: September 25, 1997

109593(5)(6)

HON. ANDREA J. FERRARA,

Plaintiff,

v

MICHIGAN JUDICIAL
TENURE COMMISSION,

Defendant.

SC: 109593
JTC: Formal Complaint
No. 52

On order of the Court, the motion for immediate consideration is considered, and it is GRANTED. The complaint for superintending control is also considered, and relief is DENIED, because the Court is not persuaded that it should grant the requested relief.

50925
[SEAL] I, CORBIN R. DAVIS, Clerk of the Michigan Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

September 25, 1997 /s/ Corbin R. Davis
Clerk

Trial Hearing – 9/29/97
Ruling Regarding Continuing Objection

* * *

[p. 9] THE COURT: And lastly, I do note, and I want the record to be absolutely clarion clear that the Respondent has a continuing objection to the admissibility and use of these tapes for any purpose in these hearings. I made a ruling last week relying on the *Murdock* case from the Sixth Circuit which seems to me compelling in terms of the ruling, but I note that you have made a continuing objection, Mr. Bendure and Ms. Cumbey, relative to the use of these tapes, and in the interest of economy, every time these tapes come up, I will note that your objection is continuing.

* * *

Trial Proceedings – 10/3/97
Ruling Allowing Tapes Over 18 U.S.C. § 2515 Objection

* * *

[p. 107] MR. SOBEL: The next point why it is more appropriate to apply *Murdock*, we are in a disciplinary proceeding. The public has a stake in the outcome of this proceeding. More than any other type of case, we need to find out what the truth is, you need to act upon the truth as does the Commission, as does the Supreme Court ultimately.

This case in particular by its nature calls out for you, the Commission, and the Supreme Court to consider all the relevant evidence relating to the issues in dispute. The *Murdock* decision gets you that relevant evident [sic] to consider.

The last reason I would cite for application of *Murdock* relates to Judge Ferrara's own choice of the Sixth Circuit law as controlling issues relating to the tapes in this case. As the Court will recall the evidence, Judge Ferrara before [p. 108] this judicial disciplinary proceeding was ever commenced by the Commission brought a civil action in the United States District Court for the Eastern District of Michigan in which she sued the Detroit Free Press, David Ashenfelter, one of its reporters, and Howard Tarjeft for a hundred million dollars.

Now, clearly, the Eastern District of Michigan is obligated to apply Sixth Circuit decisional law with regard to the tapes at issue in this case. So as to that action which she filed on the northeast corner of Fort and Washington Boulevard, Judge Ferrara willingly submitted to Sixth Circuit decisional law relating to the tape recordings in this case. But as to the disciplinary action that was filed on the southeast corner of the same intersection, she wants the Master to reach out to some district circuit in Boston or somewhere, anywhere that will help her avoid the admission of the tapes into evidence.

That type of inconsistency is inappropriate. Instead, you should apply the same law that the Federal court will necessarily have to apply in the action that Judge Ferrara herself filed as it relates to the tapes in question.

So if you are going to reconsider your decision regarding admissibility, we ask that you do it now because it is going to affect whether we call certain other witnesses. It is going to affect the evidence that will be necessary to [p. 109] examine in the proceeding, evidence that we believe is extraneous to the central issues in the case and the parties really have to have some final determination.

THE COURT: I agree with you, Mr. Sobel. Anything further, Mr. Bendure?

MR. BENDURE: Oh, yes, your Honor.

THE COURT: Briefly; we are concerned about the length this is going on, but I also don't want to give short shrift [sic] to your position.

MR. BENDURE: Certainly, your Honor, I think – Let me start at the very beginning. We have the statute itself.

THE COURT: I understand fully what your position is with regard to the statute.

MR. BENDURE: Okay.

THE COURT: And while you are collecting your things, I did read the *Young* case. Well, I scanned it. I couldn't read it, but I scanned what I think are the relevant portions of it.

MR. BENDURE: Has the Court had an opportunity to review the United States Supreme Court decision in *Gelbard v. United States*?

THE COURT: If you have given it to me, I have.

MR. BENDURE: I am not certain I have. It has certainly been cited and is the Supreme Court underpinning of both *Vest* and *In re* –

[p. 110] THE COURT: Right. I know. I have seen it referred to.

MR. BENDURE: *Golbard* was the case where a witness was called before a grand jury to answer questions based upon illegally obtained tapes. And the witness refused to answer, and the question posed was whether or not the victim of the taping could be prosecuted for contempt of court.

THE COURT: And that was a criminal prosecution.

MR. BENDURE: It was a criminal contempt.

THE COURT: Right.

MR. BENDURE: For failure to appear before a grand jury, and the Supreme Court in substance said, Section 2515 is of sufficient breadth that it bars all use including use derived thereof. Certainly, it seems to me, under the *Gelbard* decision if this evidence was illegally obtained, then my client – and she has because of her respects for the proceedings not done so – could refuse to answer a single question, and under the *Gelbard* decision she would be entirely justified to do so.

THE COURT: This is not a criminal case, and those tapes were obtained by the government, were they not?

MR. BENDURE: They were obtained by the government.

THE COURT: But these tapes haven't been obtained by the government.

MR. BENDURE: Then how on earth are they offering them into evidence? They have been obtained –

[p. 111] THE COURT: They were brought into –

MR. BENDURE: They were obtained by the government from Howard Tarjeft. There is no question about – At least, if you will allow us an evidentiary hearing?

THE COURT: He wasn't acting for the Tenure Commission.

MR. BENDURE: He provided them that information pursuant to his extortionate and criminal purpose.

THE COURT: I understand what you are saying –

MR. BENDURE: I understand too.

THE COURT: – but that is where such an unfortunate term, silver platter, comes in, but in the one instance you have a law enforcement officer or government agent doing something on behalf of the government.

MR. BENDURE: Right.

THE COURT: That is planting the bug or taping the conversation.

MR. BENDURE: True.

THE COURT: In this instance you have someone unconnected by employment with the government.

MR. BENDURE: And that is exactly what is addressed by the other cases that we have relied on: *Vest* and *In re Grand Jury* and if you will let me –

THE COURT: Right.

MR. BENDURE: May I please?

THE COURT: Go on. Go on.

[p. 112] MR. BENDURE: Let me read to you what the Supreme Court said in *Gelbard*, and I understand whether we are talking about a criminal case, Judicial Tenure Commission case, or any such case, any rule of law that excludes evidence necessarily runs contrary to the interests in presenting that evidence, however, it is obtained.

THE COURT: I agree.

MR. BENDURE: That is a given, but what we have is in our humble view a congressional enactment that does not enable anybody, not the Judicial Tenure Commission, to take advantage of evidence which if Federal law was followed would never even exist. Here is what the *Gelbard* court said, and I think this is horribly significant – Section 2515 which is the exclusionary statute:

> "Its importance as a protection for the 'victim of an unlawful invasion of privacy' could not be more clear. The purposes of Section 2515 and Title III as a whole would be subverted were the plain command of Section 2515 ignored when the victim of an illegal interception is called as a witness before a grand jury and asked questions based upon that interception. Moreover, Section 2515 serves not only to protect the privacy of communications, but also to ensure that the courts do not become partners to illegal conduct: The evidentiary prohibition was enacted also 'to protect the integrity [p. 113] of court and administrative proceedings.' "

That is the rationale of the United States Supreme Court that says the congressional interest is so great as to overcome not only the interest in prosecuting the criminal law – and I assure you my client is not charged with committing a crime – but the integrity of grand jury proceedings because the very purpose of the statute entails protecting the privacy interests of the person whose communication is illegally intercepted as well as protecting the integrity of the courts in refusing to sanction and again administer a violation of the statute.

I ask you to look to Section 2515, and I submit to you that its language could not be more clear.

Mr. Sobel, I believe, misspoke himself when he said *Vest* refused to extend *Murdock*. *Vest* was the first case on point. In that particular case the defendant was charged with offenses arising from the shooting of a police officer.

There was an illegal tape obtained, not by the prosecution, but was provided by someone who was cooperating with them.

THE COURT: This is the First Circuit case?

MR. BENDURE: This is the First Circuit case. It is the first case in the country that deals with the issue in the wake of the Supreme Court decision in *Gelbard* with its admonition to the courts, the first one to deal with an issue where the government was not the initial perpetrator but [p. 114] wanted to use the evidence.

THE COURT: And they said that 2515 had no exception when illegally intercepted communications were introduced.

MR. BENDURE: And let's look at the statute –

THE COURT: And that is different from *Murdock*; correct? That is different from the holding in – That is the other side?

MR. BENDURE: *Vest* is the first case which *Murdock* ignored or went the other way on.

THE COURT: Right.

MR. BENDURE: But let's look at the statutory line which is certainly an important starting point which the Supreme Court interpreted in *Gelbard* as being all inclusive in its exclusionary scope. Whenever any lawyer or –

THE COURT: I have read this. I have it right in front of me so you needn't read it.

MR. BENDURE: But the point is, if you look at the breadth of it before a court grand jury agency, regulatory body of the United States, or sub-division thereof, Congress says that it does not come in. It does not come in.

THE COURT: If it violates the statute.

MR. BENDURE: If it violates the statute, and that of course is the issue yet to be resolved. We have the *Vest* case which I submit is directly on point, the first one on point. We then have the Sixth Circuit which takes the [p. 115] opposite view in *Murdock*, and I believe it is *Doe*, the energy case, with, I would point out, a very, very strong dissent by Chief Judge Merritt (ph.) of the Sixth Circuit whose point in the *Doe* case, says in substance, in effect, that it is intellectually dishonest to accept *Murdock* and follow it. It was wrongly decided.

Like it or not, Congress has enacted a statute which is all inclusive in its scope, knows of no exception, and furthers an over-riding Federal purpose in protecting those whose privacy is invaded and in prohibiting all courts and agencies from what is a second violation in view of the statute which is the use and disclosure of improperly obtained things.

If the Court were to allow it, the Court in all practical purposes is itself violating the Federal statute, and I suggest that if we are talking about bringing disrepute on the courts, knowingly violating a Federal statute by Congress would accomplish that. That is exactly why the exclusionary statute is as broad as it is.

Then we have the more recent *Grand Jury* case from the Third Circuit which on the core issue of the so-called silver platter doctrine looks at the *Vest* view and the Sixth Circuit view and says *Vest* is the right rule of law. *Murdock* and the Sixth Circuit view is intellectually indefensible in light of the clear language of the Federal statute and the sentiment [p. 116] expressed by the United States Supreme Court in the *Gelbard* case.

So what we have is the statutory language which I think is eminently clear on its face: the sentiment by the U.S. Supreme Court in *Gelbard* that says it extends to the use because the courts are not to become partners in this.

THE COURT: Is that the *Grand Jury* case? *In re Grand Jury* was also a criminal case? Right?

MR. BENDURE: Yes, your Honor.

THE COURT: The Third Circuit case, that is the one involving a family. Right? Okay.

MR. BENDURE: Yes, and it seems to me judges aren't worse than criminals. They should at least get the same protection from Congress. In light of the statute that could not be more clear that says any agency – it doesn't limit it to courts – it speaks of agencies of the United States, whether we are talking the Workers Comp Appeal Bureau, Judicial Tenure commission, Attorney Grievance Commission, or anything else. Because, under the supremacy clause, Congress is entitled to govern that and simply say they can bring whatever case they want but they can't use illegally obtained evidence or evidence derived therefrom to do it.

THE COURT: All right, I understand.

Anything further, Mr. Sobel?

MR. SOBEL: Just a couple of things.

[p. 117] First of all, my observation would be that Judges are worse than criminals when they seek to obstruct the truth from being known because they are held to a different standard. They are held to a standard which is set forth to protect the integrity of the judiciary. Criminals don't have that obligation.

The *Gelbard* case that Mr. Bendure referred to used some broad language. It was written in 1972. God bless his soul, it was when Justice Douglas was on the Court. There were a lot of very liberal statements made during that time in the Supreme Court's history. The fact of the matter is, the cases decided recently don't give that sweeping protection that may be suggested by the language in *Gelbard*, and as you have seen, the Sixth Circuit certainly doesn't buy into it and the Third Circuit doesn't either.

I am looking at Page 1075 of this *In re Grand Jury* case where the Third Circuit said, and I quote: "Therefore, as we observed in a prior case, Section 2518(10)(a) does not authorize a victim of an illegal wiretap to move to suppress unlawful Title III evidence before the grand jury."

The Third Circuit distinguished between moving to quash a subpoena to obtain allegedly illegally recorded conversations and moving to suppress the evidence once it is in the hands of the government. The evidence here is in the hands of the government. It is in the hands of the Court, [p. 118] for that matter. And for all the reasons I have cited before, if you do reconsider the admissibility of these tapes, rule as you already have that they are admissible.

MR. BENDURE: Your Honor, one thing should be pointed out. Mr. Sobel has spoken to Section 2518. We are relying on 2515. That is the exclusionary statute which is discussed at Pages 1077 and 1078 which includes, and liberal or not, *Gelbard* which is the last word of the United states Supreme Court on this.

Then, moreover, the last word of the Federal circuits is in our favor. So this isn't some old liberal b-s, this is Federal law. It is controlling.

THE COURT: It is Federal law but not in this circuit.

MR. BENDURE: The United States Supreme Court, your Honor, I think –

THE COURT: I'm talking about the First and Third Circuits. I have a terrible time keeping the circuits straight. I know that we are in the Sixth Circuit.

MR. BENDURE: Right, and we are defined deference to the Sixth Circuit as where there are state law claims that are involved on the theory that they have a better recognition of Michigan law.

But this is an issue of pure Federal law and, therefore, whether you look at the statutory language, the sentiment behind *Gelbard*, or the majority view, the first view, or the [p. 119] most recent view, they all come out the same way which, of course, is to say nothing about the Michigan eavesdropping statute which was interpreted in the *Dickerson* case so as to create a civil cause of action against Sally Jessy Raphael for obtaining this if we want to look for a little local –

THE COURT: – color. I was wondering if we would ever get to that case, Sally Jessy Raphael. I was hopeful that we could get through this hearing without referring to that.

It is certainly clear that the only two consistent decisions in this circuit are decisions that basically hold that if surveillance tapes of this type come into the hands of the government agency they can be introduced in evidence regardless as to whether they were legally or illegally obtained. That is the holding of the Sixth Circuit. And while it may be a troubling holding in some instances, it is the law of this circuit and I am not going to rule against it.

But incorporated with the ruling is this notion, and that is we have an obligation to seek the truth in a case of this nature; in other words, a formal complaint against a sitting judge in this state. And the case law that applies clearly applies in this court in this circuit unless I can find a compelling reason to rule against it.

And it seems to me that the government fell into these tapes, the government in the form of the Judicial Tenure [p. 120] Commission did not solicit these tapes, and I think the government cannot ignore this information that was used to form a basis of this formal complaint, and I will not reverse my ruling.

I apologize if it was not clear last week, but I have now read everything that you have submitted to me and my ruling will stand.

Now I think we have to proceed. It is a quarter of 3:00.

MR. BENDURE: Your Honor –

THE COURT: You have made all your points, Mr. Bendure, and I am not going to reverse myself.

MR. BENDURE: I understand, but I would like the record to reflect that we haven't been able to offer virtually a shred of evidence regarding this issue what the ruling is. You are assuming it fell into the government's hands. I am prepared to prove that they subpoenaed these tapes, your Honor, that they subpoenaed them, and if that is not obtaining it by government coercion and process, what is?

THE COURT: Well, Mr. Bendure, curiously enough, there was no motion to quash the subpoena, but I think the tapes were subpoenaed to be made –

Was there a subpoena issued, Mr. Sobel to get the tapes into your shop in the first place so Mr. Bendure could make copies or was that simply at a request. I know they were [p. 121] subpoenaed to be here today.

MR. SOBEL: I think the interesting thing, and the record should reflect this insofar as it may support your decision, is that at one point in time in these proceedings when Mr. Bendure wanted to have the tapes examined by an expert on behalf of Judge Ferrara, he encouraged the Master to order that the Commission subpoena the tapes, or at least arrange to have the tapes produced at the Offices of the Commission so that his expert could make copies and examine those tapes. That seems to me to be totally inconsistent with his argument here today that somehow we did something wrongfully in securing these tapes before the hearing.

MR. BENDURE: I just think it is premature to decide how it came into the government's hands before we have got any evidence.

THE COURT: Well, the whole thing in *Murdock* is that it doesn't matter whether it was legally or illegally seized and so, in that sense, it does not matter.

MR. BENDURE: Well, then, your Honor, will the Court at least follow the United States Supreme Court in *Gelbard* if my client refuses to answer?

THE COURT: This isn't a criminal proceeding. This is a civil proceeding.

MR. BENDURE: I understand, your Honor. What I am suggesting is when a statute says "any agency" that a judge [p. 122] is at least entitled to the same protection as a criminal. They are no less worthy of the statutory protection and they are no less covered by the explicit language of the statute.

THE COURT: Why would any witness in a civil proceeding – If a witness were to refuse to answer a question, Mr. Bendure – I don't want to use Judge Ferrara as an example – but there isn't an allegation or shred of evidence that I am aware of that there is any criminal responsibility associated with these proceedings. When you refuse to answer a question under the constitution is when the answer would tend to incriminate you, and "incriminate you" is a word that is used in the context of criminal charges. What criminal charge are you talking about?

MR. BENDURE: Judge, if you look at the *Gelbard* decision –

THE COURT: That was a criminal case.

MR. BENDURE: It was a contempt for refusal to answer a question case.

THE COURT: It was a criminal contempt.

MR. BENDURE: The United States Supreme Court said a person is lawfully entitled to refuse to answer a question based upon evidence obtained in violation of this act. Now that distinction can be drawn by –

THE COURT: When the evidence obtained in the violation of that act is going to be used in a criminal prosecution [p. 123] against the witness.

MR. BENDURE: That certainly doesn't say that in *Gelbard,* your Honor. The conclusion of 2515 –

THE COURT: Sometimes the obvious doesn't have to be stated.

MR. BENDURE: It is an available defense to a contempt charge. It says that a witness can refuse to answer. Now if we are going to draw that distinction, I suggest that my client is entitled to refuse to answer and that you are at least obligated to follow the United States Supreme Court decision on that point in *Gelbard.*

THE COURT: Mr. Sobel?

MR. SOBEL: I guess if Mr. Bendure is requesting that the Court allow Judge Ferrara to refuse answer questions relating to the tapes I guess I am wondering what he views as an appropriate sanction for that assuming that she can avoid answering questions here today under oath. Is it that she can avoid questions –

THE COURT: Before you say anything else, I would like to say that I have not heard a shred of evidence or testimony before me. There is some question as to whether a 28-day letter was answered. Someone thought that it wasn't and Judge Ferrara thought that it was, but there has been nothing on this record that would indicate to me that Judge Ferrara has not fully cooperated. She was described by Dr. Luby as [p. 124] having fully cooperated with him in his evaluation and she has answered ever [sic] question that she was asked before me.

So before you proceed, and I didn't mean to interrupt your line of thought, Mr. Sobel, but as of this point I have, if any, extremely limited evidence before me that would indicate that there has been lack of cooperation by Judge Ferrara. Now, continue.

MR. SOBEL: I won't acknowledge that that is the case, but –

THE COURT: I understand that.

MR. SOBEL: – but I am not going to belabor it because I don't think it is significant at this point. What I would point out is that this is a judicial disciplinary proceeding and that Judge Ferrara has an obligation to cooperate in the search for truth.

THE COURT: I think so.

MR. SOBEL: That she cannot refuse to answer questions unless there is some recognized privilege; that the privilege that Mr. Bendure suggests applies doesn't apply if you adopt the rule of law of *Murdock* which says that there is a silver platter exception to the exclusionary rule that once the tapes are admitted she certainly can be questioned about those tapes. And if she refuses to answer it seems to me that the appropriate remedy is for the Court to find her in default, for the Master to find her in default, to find that [p. 125] all of the claims asserted by the Commission have conclusively established and to pass the matter forward to the Commission.

I don't think it is appropriate for Judge Ferrara to pick and choose what evidence is going to come into this proceeding. To shield the truth by refusing to testify on the one hand and then presumably volunteering information that she thinks is favorable to her on the other hand, that is unacceptable.

THE COURT: I agree, Mr. Sobel.

* * *

Trial Proceeding – 10/3/97
Refusal To Answer Question

* * *

[p. 145] Q Do you recall hearing the following exchange on that tape recording:

An adult female voice saying. "You are probably part black."

A male voice then saying: "Huh?"

[p. 146] The female voice then saying: "You're probably part black."

The male then laughing.

The female then saying: "You are. I think you are. I think you got nigger blood in you."

The male then saying: "Oh, who knows? Maybe you are right."

The female then saying: "I think you really do. I think –"

The male: "Hey, maybe I do. Maybe I do. Maybe there is some Sicilian blood in the background. Who knows?"

And then the female saying: "I know there is, and that's nigger."

Do you remember hearing that exchange?

MR. BENDURE: I object, your Honor, on the basis that it is evidence derived from the tapes which we submit were illegally obtained and have not yet been authenticated.

THE COURT: I understand, Mr. Bendure, that that is your continuing objection.

A I respectfully decline to answer that question on the basis of my privacy rights under Federal law 18 USC 2515, 18 USC 2511, Sub (1) and Sub (2)(d) and the *Gelbard v. United States* decision cited at 408 US 41, 92 Supreme Court 2357, 33 L.Ed.2nd 179, 1972, under the U.S. Supreme Court.

Q (By Mr. Sobel, continuing): I hear your refusal to answer, [p. 147] and I hear the reasons you have given for that refusal. I just want to make sure that you are clear on what I am asking you. And I am simply asking you at this point if you heard that portion of the tape recording that was played here today in open court?

A I refuse to answer any questions on the basis of the use of those tapes for the reasons cited on the record.

* * *

Trial Proceedings – 10/3/97
Refusal To Answer Question, Contempt Finding

* * *

[p. 154] Q I am going to give you another opportunity to answer the following question: Did you hear, Judge Ferrara, this afternoon as we played Segment 6 to its conclusion – at least as to what is on the video tape – the following exchange: An adult female voice: "You are probably part black."

A male voice: "Huh?"

A female voice: "You're probably part black."

The male then laughing.

The female: "You are. I think you are. I think you got nigger blood in you."

The male: "Oh, who knows? Maybe you're right."

The female: "I think you really do. I thing –"

The male: "Hey, maybe I do. Maybe I do. Maybe there's [p. 155] some Sicilian blood in the background. Who knows?"

The female: "I know there is, and that's nigger."

Do you remember hearing that exchange as we played the balance of Segment 6 today in open court?

A I decline to answer any question on the basis of those tapes.

MR. SOBEL: Your Honor, at this time on behalf of the Commission I move that you find Judge Ferrara in contempt. I move that you strike her answer to the Amended Formal Complaint, and I move that you enter her default.

THE COURT: What are you basing this on, Mr. Sobel? The court rule says that her failure to answer may be considered as an evidentiary fact. I am short circuiting what the rule says. This is 9.211(B). I don't believe you would be entitled to a default at this point.

MR. SOBEL: I believe that I am entitled to a default because her failure to answer is a failure to produce evidence in this proceeding. Where it says failure to appear, it refers to respondent's failure to answer.

THE COURT: It says failure to answer or to appear at the hearings.

MR. SOBEL: Right. That failure to answer is not referring to answering questions at the hearing; it is referring to the failure to answer the Complaint. In other words, if a respondent judge fails to answer the Complaint or appear at the hearing.

[p. 156] THE COURT: No, it says to testify in his or her own behalf.

MR. SOBEL: Right, but we are not talking about a situation where the Respondent is failing to testify in his or her own behalf, we are talking about a situation where the respondent judge is failing to provide evidence when called as a witness by the Commission. What this rule that you are focusing in on essentially says is, look, if a respondent is charged with judicial misconduct, fails to answer the Commission's Complaint, fails to appear at the hearing, fails to testify on his or her own behalf, that standing alone does not establish the grounds alleged, the acts of judicial misconduct alleged in the Complaint. The Commission must go forward independently and establish the judicial misconduct that it has alleged in the Complaint.

That is what that rule is all about. That rule has nothing to do with the situation that is now before you, your Honor, in which the Judge has been called as a witness by the Commission and refuses to give evidence, and I believe that you have instructed her to answer.

THE COURT: I have not ordered her to answer.

MR. SOBEL: Then I would ask that you order her to answer, and if she refuses to answer that you find her in contempt, strike the pleadings she filed to the Amended Formal Complaint, and you enter her default.

[p. 157] THE COURT: Mr. Bendure, do you have any thoughts?

MR. BENDURE: Obviously, we oppose all of those requests, your Honor. She has filed an answer. She has appeared. She has invoked rights which we submit are provided to her by Federal law.

THE COURT: Judge Ferrara, I recognize that you have a significant objection. Indeed, I understand the reasons for the objection relative to the admissibility of these tapes in this hearing. And I have tried in every way possible to make it obvious that the legal question upon which I ruled is one that is the subject of a continuing objection by you and your attorney on your behalf. I have never for a minute failed to recognize that this would unquestionably be a matter of continued litigation; in other words, my ruling was going to be appealed by no matter what way I ruled. That has always been clear to me.

I find myself in the awkward and unfortunate position of having to order you to answer this question. I believe that the hearing so far has been conducted mindful of your continuing objections, but I also am obliged to tell you that the sanctions for failure to answer are serious, and I think you know that as well. With this, I order you to answer.

THE WITNESS: Well, your Honor, I am not trying to be difficult and I am not trying to be uncooperative; I am merely asserting my Constitutional rights, and I think that I [p. 158] am entitled to the same Constitutional rights as any other citizen of the United States, and I don't think that anywhere in the Constitution that I have read that the Constitution applies to every U.S. citizen in the United States except for judges.

I'm sorry but I have to respectfully decline to answer any questions on the basis of my privacy rights under Federal law 18 USC 2515 and 18 USC 2511, Sub (1) and Sub (2)(d) and the *Gelbard v. U.S.* decision at 408 US 41 in the Supreme Court. And it is very clear that my privacy rights are being violated by this very process, by these series of questions, and I absolutely refuse to answer them, and whatever you have to do, you have to do.

THE COURT: You asked for an Order of Contempt. Mr. Sobel?

MR. SOBEL: I ask for an Order of Contempt that the Respondent Judge's Answer to the Amended

Formal Complaint be stricken and that a default be entered.

MR. BENDURE: I submit, your Honor, that under the *Gelbard* case –

THE COURT: We have heard enough about that case.

MR. BENDURE: Fine. If you won't entertain my objection, fine.

THE COURT: Why don't you all come into the office before I rule.

[p. 159] You may step down.

(Proceedings in recess at about 4:04 p.m. proceedings resumed at about 4:22 p.m.)

THE COURT: All right, where we are right now is this:

Mr. Sobel, if I did not indicate so before the recess, I am compelled to grant your motion for the contempt, and you may prepare an Order of Contempt. We will set this for a hearing at 9:00 a.m., next Thursday, October 9th, on the appropriate sanctions.

No. 2, the striking of the Respondent's pleadings and the entry of a default is unique, I think, in the annals of Tenure Commission proceedings, and in view of its uniqueness, I am going to ask for memoranda from you and Mr. Bendure to be provided by the close of the business day, and why don't we say that is 4:30, Tuesday, October 7th. I will be hearing a jury trial in Clarkston on that date so I know that I will be out there until 4:30, and as been done in the past, you are more than welcome to submit this by FAX.

If a default is entered, whether it is or isn't, Mr. Sobel, I anticipate that we will resume testimony between 10:00 and 10:30 Thursday morning.

* * *

Trial Proceedings – 10/9/97
Contempt Finding and Preclusion Ruling

* * *

[p. 24] MR. BENDURE: Could I ask you to read the *Vest* opinion which declined to create a perjury exception.

THE COURT: I have read it.

I am going to try and address these issues in an orderly fashion, and I am not certain that the order that I address them in now will be as coherent in my view tomorrow or the next day. In other words, I am going to try and address everything that has been raised.

No. 1, I am going to strike the document that was filed yesterday. This is the motion for rehearing on my ruling admitting evidence and derivative evidence, the document that was hand-delivered to me and the Commission yesterday.

It is just inappropriate at this stage of the [p. 25] proceedings and I am not certain that it allowed under the court rule.

As to the privilege regarding the invasion of privacy, the difference between the assertion of the privilege on Friday and the failure to assert it last Monday, the 29th, was the admissibility of the tapes, and my recollection is that I denied the motion for an evidentiary hearing on the acquisition of the tapes before Judge Ferrara testified. That motion had been filed before the hearing started and I acknowledged that there was a continuing objection to the admissibility of the tapes entered by the Respondent throughout the course of this hearing. But the motion seeking an evidentiary hearing on the recording of the tapes had been denied.

It is clear that the Federal Wiretap statute does allow the invocation of its provision as a defense to a contempt citation and that is the *Gelbard* decision of the United States Supreme Court. In the context of this particular case, I have read the *Gelbard* decision, and the *Gelbard* decision, and I can't quote from it right now, but there is a passage in the *Gelbard* decision that talks about the narrow issue that the court was considering, and that narrow issue was relative to asserting the privilege as a defense to a contempt citation and the proceedings that were involved were grand jury proceedings looking into potential criminal [p. 26] conduct.

This is not and this has never been by any view that I can conceive of as a criminal proceeding. This is a civil proceeding. The court rule established by the Supreme Court relative to hearings before the Judicial Tenure Commission clearly indicates that this is a civil proceeding and not a criminal one. There is nothing in this Complaint that I can see, the Complaint filed by the Commission, that alleges criminal conduct by Judge Ferrara. None of the allegations here relate to criminal conduct by the Respondent.

In the cases that I have read that relate to proceedings before the Judicial Tenure Commission and cases that have been referred to me that I have not read – I must confess there is a Rhode Island case that I have not read – but the cases that I have read from the Court of Appeals and the Michigan Supreme Court, the opinions that I have read – and When I say opinion, I guess I am referring to the opinion produces by the Judicial Tenure Commission itself in connection with Complaint No. 33 which was a decision relative to that Complaint which did address the question of a respondent's refusal to take the stand as a witness after being told by the Master that he was legally obligated to do so.

I have read all of these and one thread that runs through Tenure Commission proceedings is almost a demand that [p. 27] the respondent testify, and the demand in a sense is because of the concern that the Bar has, the Commission has, and the Supreme Court has in conduct relative to the administration of justice, and that in essence the failure to testify can be conduct prejudicial to the administration of justice and thereby related to misconduct in office.

Without tipping the wink, Mr. Sobel, it seems to me that the refusal of the Judge to testify on Friday does form a basis for a count based on evidence presenting at the hearing for judicial misconduct, and if it is your view that a count should be added, I will allow you to do so.

I want to talk about the privilege that was asserted, the right of privacy. I will be the last person to say that we do not have privacy rights. I will be the last person to say that we do not have First Amendment rights. But it seems to me that when an individual assumes the responsibility of judicial office and swears to uphold the Constitution and laws of the State of Michigan, and by inference the Canons of Judicial Conduct, there is an implicit willingness to do so.

Any reading of the Canons of Judicial Conduct must produce the conclusion that First Amendment rights of judicial officers are circumscribed, and I think we all recognize that First Amendment rights can be circumscribed. I think it was Justice Holmes who raised the example of fire in a crowded theater.

[p. 28] By inference then, knowing that the First Amendment rights that we all have is not absolute and that by assuming judicial office individuals accept willingly additional circumscription, circumscribing of First Amendment rights. It logically seems to follow that privacy rights may also be circumscribed in the context of judicial service.

There is an interesting question unanswered in the *Gelbard* case and that is what the impact on civil proceedings are because the grand jury proceedings were by definition criminal proceedings, and then farther on the question as to if there is an absolute right to privacy created in the Federal wiretap statute, whether that absolute right goes to the privacy rights asserted by a judge in a civil proceeding relative to that judge's alleged misconduct.

If there were ever an exception that could be clearly carved out of the privacy rights, I think this is it. In the context of this case, it is clear that there is an attempt to have cake and eat it, and that is in essence the argument. In essence, I am adopting the arguments that Mr. Sobel raised relative to public statements by the Respondent both in terms of the print media and the television media and on the one hand you cannot say outside of court one thing and then assert a privilege which may not exist inside of court.

Relative to the waiver of the privilege, the admissibility of evidence has never been held to justify a [p. 29] resurgence of a waiver of the privilege. In other words, if the privilege was to have been asserted in the context of this hearing, the privilege asserted on Friday afternoon by Judge Ferrara should have been asserted on the record before the hearing started and we might have been having a hearing on this issue on Monday instead of on Friday if questions relative to the tape were refused to be answered. And I know of no testimonial privilege relative to privacy other than the one that the Supreme Court and Congress seem to have created in the context of wiretapping for criminal proceedings.

Now I wish to also say that there is a major distinction in most of the decisions and the decisions that deal with issues relating in criminal proceedings. It is clear to me that had these tapes been made under any authority, any governmental authority, the factors that I would have to consider might be different, but these tapes were not made under color of governmental authority and these tapes have never been used in anything that I know of other than these proceedings here. And so I reject the argument that there was a legitimate invocation of a privilege on Friday afternoon in the context of any rulings that I had made during the course of the hearing.

And I will not reverse my finding that the Judge was in contempt at that time, but as I said earlier this morning, [p. 30] this is a civil contempt, not a criminal contempt. I will reserve ruling on all the sanctions for this contempt but this contempt cannot go unsanctioned. The question that was not answered on Friday was, I believe, a question relating to a telephone number.

Is that correct, Mr. Sobel?

MR. SOBEL: No, your Honor.

THE COURT: Was this the generalized question –

Judge Ferrara, I did assert without being ordered to do so a privilege relative to that question, but I think the last question –

Was the last question a generic question relative to answers about the tapes?

MR. SOBEL: Your Honor, as I recall the circumstances, we had played the segment of the tape-recorded conversations known as Segment 6, and my question to Judge Ferrara after that tape-recorded conversation was played was whether during the playing of that tape-recorded conversation she heard a certain exchange, and I read to her what the exchange consisted of, and it was in response to a question along those lines that she asserted the right not to answer the question.

THE COURT: Right.

Because of the higher standard that judges are held to. I believe an argument can be made that jail isn't an [p. 31] appropriate sanction, and I reject that argument. I am not going to do that in the context of this hearing, but I do believe also that entering a full default is inappropriate in the context of this hearing because it seems – There is no question in my mind that regardless of what the ruling I make is relative to this contempt, the Examiner still has an obligation to prove his case, and the default is fiction.

On the other hand, it does seem that there has to be an appropriate sanction, and the sanction is that what will be stricken from this hearing will be any pleadings that the Respondent has made relative to the tape-recorded statements, and I will deny her the right and opportunity to present evidence relating to the tape-recorded statements.

I believe I had set to rest the question of an evidentiary hearing earlier on in these proceedings.

* * *

STATE OF MICHIGAN
BEFORE THE MICHIGAN JUDICIAL TENURE COMMISSION

COMPLAINT AGAINST:

HON. ANDREA J. FERRARA Judge, 3rd Circuit Court Detroit, Michigan 48226	FORMAL COMPLAINT NO. 52

ORDER IMPOSING CONTEMPT SANCTIONS

On October 3, 1997, Respondent Judge Andrea J. Ferrara was found in contempt. An order was signed on October 6, 1997, scheduling a hearing on the sanctions to be imposed for Respondent Judge Andrea J. Ferrara's contempt for Thursday, October 9, 1997. The Examiner and counsel for Respondent Judge Andrea J. Ferrara filed Briefs addressing the issues. After considering the records and files herein, including the Briefs filed by the Examiner and counsel for Respondent, and the arguments of counsel at the time of the hearing on contempt sanctions, being fully advised, for the reasons stated on the record at the time of said hearing,

IT IS HEREBY ORDERED as follows:

1. Those portions of Respondent Judge Andrea J. Ferrar's Answer to the First Amended Complaint relating to her alleged tape recorded statements are stricken; and

2. Respondent shall not present evidence during the hearing relating to the alleged tape recorded statements.

THIS **ORDER** has been signed on this 14th day of October, 1997.

/s/ Vesta Svenson
HON. VESTA SVENSON,
MASTER

Approved as to Form:

/s/ Allan D. Sobel Allan D. Sobel (P 40872) Examiner	/s/ Mark R. Bendure by ads per consent 10/13/97 Mark R. Bendure (P 23490) Attorney for Respondent Judge Ferrara

STATE OF MICHIGAN
THE MICHIGAN JUDICIAL TENURE COMMISSION

COMPLAINT AGAINST:	
HON. ANDREA J. FERRARA	Formal
Judge, Third Circuit Court	Complaint
Detroit, Michigan	No. 52

REPORT OF MASTER

This report is issued pursuant to the June 11, 1997, Michigan Supreme Court order appointing Vesta Svenson as Master to hear formal complaint no. 52 against Hon. Andrea J. Ferrara. It is divided into two parts: (1) procedural history and (2) findings of fact and conclusions of law. By necessity, the procedural history includes some legal decisions which affected the conduct of the formal hearing.

Procedural history

During the effective time of the above order, the Master was sitting regularly as a Visiting Judge at the 52-2 District court, Clarkston, Michigan. The parties agreed to that location for preliminary matters requiring court appearances. Some preliminary issues were capable of resolution via telephone conference calls. Ultimately, the hearing was held at the 34th District court, Romulus, Michigan on: September 29 and 30; October 1, 3, 9, 10, 27; and November 5 and 6, 1997. A final evidentiary ruling was deferred on Exhibit 49a pending review by Respondent and submission of the parties' memoranda of law. Closing arguments were submitted in writing by the parties on December 1, 1997.

At the June 17, 1997, prehearing conference, motions were scheduled for filing by July 16, answers by August 8, and oral argument on August 21. Witness lists were to be exchanged by August 8. The formal hearing was scheduled for September 29 and 30.

On June 20, the Examiner moved for mental examination of Respondent pursuant to MCR 9.207(G). This motion was resolved by telephonic conference on July 15 and set forth in the order of July 22, 1997.

There were two motions orally argued on August 21: (1) Respondent's motion to dismiss or strike nonconforming pleadings and (2) Examiner's motion to amend formal complaint. Respondent's motion was denied and Examiner's motion was granted. Oral motions, requests, and scheduling matters were argued and discussed on August 21. The results are set forth in the order of September 3, 1997.

The Examiner's witness list was timely filed and, although late, Respondent's witness list was allowed after filing on August 29. Before and throughout the hearing amendments, modifications, and adjustments to witness lists were liberally granted in the interest of fairness to all parties. During the formal hearing, the Examiner called eight witnesses, among them the Respondent. The Respondent called twenty-two witnesses, including Respondent.

Included on Respondent's original witness list was David Ashenfelter, a reporter for the *Detroit Free Press*. Upon receipt of a subpoena to testify, Ashenfelter's attorney moved for a protective order and motion to quash subpoena. An ancillary hearing was held on this motion on September 30 and the motion was granted (T., vol. II, p. 83-93) and an appropriate order entered October 9, 1997.

A continuing celluloid thread throughout this inquiry is a series of tape-recorded telephone conversations between Respondent and her ex-husband, Howard Tarjeft. The recordings were made without Respondent's knowledge or consent. The Tarjeft tapes were brought, unasked for, to the Judicial Tenure Commission offices and are the basis of the formal complaint (before amendments). The tapes, held in the custody of Tarjeft, were copied and reviewed by Respondent's counsel. The procedure for this review was established in a July 23 telephone conference and set forth in the order entered July 28, 1997.

At every opportunity before and during the hearing, Respondent sought to have the tapes suppressed. The transcripts and pleadings are replete with arguments regarding admissibly.

Of concern to all, including the Master, is the privacy right normally associated with telephone conversations. Respondent's motion to dismiss, trial brief, supplemental trial brief, and motion for evidentiary hearing address the issue. So also do the Examiner's responses and hearing memorandum. After review of the pleadings, case law, and Respondent's motion for an evidentiary hearing regarding the making of the tapes and the purpose for which they were made, the Examiner's arguments proved persuasive and the tapes were admitted and no evidentiary hearing held (T., vol. III, p. 60).

Once the tapes were admitted and after answering earlier questions based upon the recordings, Respondent refused to answer further questions. She asserted privacy rights under 18 USC §2515 (federal eavesdropping statute) and *Gelbard v. United States*, 408 US 41; 92 S Ct 2357; 33 L Ed 2d 179 (1972) In support of this refusal (T., vol. IV, p. 146-147). Eavesdropping in *Gelbard* was pursuant to federal court order, conducted by federal agents, and involved third parties. The third parties *were* allowed to assert invasion of privacy rights when they refused to testify before a grand jury. Here, conversations were taped by a party to them, not done under color of governmental authority, and given, unasked for, to the Judicial Tenure Commission. *See* particularly, *United States v. Murdock*, 63 F3d 1391 (6th Cir. 1995), where, as here, the government had no part in an unlawful interception (Examiner's hearing memorandum, p. 15-17, and additional colloquy during the formal hearing, (T., vol. IV, p. 103-120). The Examiner's motion for contempt was granted and an order scheduling hearing on contempt sanctions entered October 6, 1997.

Additional memoranda were filed by the parties and argued on October 9. The Examiner's request for a default was denied, Respondent's pleadings relative to tape-recorded statements were stricken, and Respondent was precluded from presenting evidence regarding the taperecorded statements. Respondent was also advised that the contempt could be purged by answering Examiner's questions relative to the tapes (T., vol. v. p. 6-32).

At the close of the morning session on October 10, the Examiner rested. Respondent was advised that a motion for a directed verdict was inappropriate and would not be heard. Upon resumption after the lunch break, Respondent had no witnesses present who she wished to call. Respondent was sanctioned for delay of proceedings and assessed $200 in costs (T., vol. VI, p. 80-85).

On two occasions during the hearing, testimony was adduced which prompted the Examiner to seek additional amendments to the formal complaint pursuant to MCR 9.214 (T., vol. v. p. 35-36; vol. VII, p. 105-107). The amendments were allowed, second amended and third amended complaints were filed, and answers received from Respondent.

On the last day of testimony, November 6, 1997, the Examiner sought to impeach Respondent's testimony by use of a previously unknown tape recording of a 1989 telephone conversation with her former brother-in-law. The parties agreed to file memoranda of law, discuss a possible stipulation after Respondent listened to the tape, and await a ruling on admissibility after the testimonial phase of the hearing closed. After review of the memoranda and stipulation, the tapes were admitted for impeachment purposes only.

Lastly, before resting, the Examiner withdrew, without objection, paragraphs 13a and 13b of the first amended complaint (T., vol. VI, p. 78).

Findings of fact and conclusions of law

After opening statements on September 29, 1997, Respondent herself was the first witness called by the Examiner.

On the basis of her testimony, I find Respondent has served as a judge in the Third Judicial Circuit since January 1, 1993. She had been a 33rd District Court judge from January 1981 thought [sic] December 31, 1986. In a letter to Hon. Joan Young dated February 2, 1997, Respondent expressed willingness to sit as a visiting judge (Exhibit 16). From January 1, 1987, through December 31, 992 [sic],Respondent had intermittent assignments, principally in the 19th and 36th District Courts. This testimony proves the allegations of paragraph 2 in the second amended complaint.

On May 12, 1992, Respondent signed and filed a Statement of Organization for Candidate Committee (*see* Exhibit 1 and T., vol. I p. 36-40).

Thus, at all times relevant to this inquiry, Respondent has been bound by the Michigan Code of Judicial Conduct.

Much of the time during Respondent's testimony on September 29, the Examiner played tape recordings, portions of tape recordings, and one audio-visual recording of a television newscast. At intervals, playing was stopped and Respondent questioned. Several times Respondent indicated the female voice either sounded like her or appeared to be her voice (T., vol. I, p. 63, 74, 108, and 112, e.g.). In one instance, she did not recognize her voice (T., vol. I, p. 98). Responding to a questions [sic] regarding use of the work "niggertown," Respondent's answer – "It is a poor choice of words. Poor judgment" – is a tacit acknowledgment of the voice as her own (T., vol. I, p. 86). Not all of the tapes were played in open court, nor were those played all played in their entirety.

Ted Russell Lewis was called by the Examiner on October 3, 1997. His expertise in the field of forensic audio and video tape analysis was stipulated to by Respondent (T., vol. IV, p. 14; *see also* Exhibit 36, Lewis vita summary). Lewis listened to every conversation recorded on the tapes from beginning to end. Except for the voice of one minor female, appearing once, the tapes contained only one adult male voice (Howard Tarjeft) and one adult female voice (T., vol. IV, p. 30).

On March 20, 1997, Respondent filed a complaint in federal court against the *Detroit Free Press, Inc.*, David Ashenfelter, and Howard Tarjeft. In paragraph 11 of this complaint, Respondent acknowledges having telephone conversations with Howard Tarjeft who recorded them. This complaint was verified by Respondent, under oath, on March 19, 1997 (Exhibit 6). The tapes referred to in the federal complaint are from the same source as those introduced in this hearing.

The evidence that Respondent made the statements attributed to her in the formal complaint is overwhelming and I find it to be true. The allegations in paragraphs 1 through 9, 11, 12, and 16, of the first amended complaint are amply proven.

When asked by the Examiner whether she had heard the tapes, Respondent avoided direct answers, creating an ambiguous impression (*See*, e.g., T., vol. I, p. 55-57). In February 1997, at the televised news conference, she unambiguously stated: "These tapes are a fake. I have listened to the tapes and that is not my voice contained on the tapes." *See* Exhibit 4 which includes a televised clip of another conference where attorney Lawrence

Stockler, acting for Respondent who was present, said he didn't care whether her taped statements were true or not (*see also*, T. vol. I, p. 149-156).

The above prove the allegations in paragraphs 15 and 17 of the first amended complaint.

A cumulative effect of the proven allegations in paragraphs 15 through 17, all public statements, is proof of the public misrepresentation alleged in paragraph 18 of the first amended complaint.

Dissemination of the tapes to the *Detroit Free Press* produced a flurry of publicity (T., vol. I, p. 128-132; Exhibits 4 and 8a). Chief Judge James J. Rashid was compelled to issue a press release (Exhibit 14A) as well as publicly comment on the situation because of his concern about the public perception of the judiciary (Exhibit 4). Judge Rashid received 24 letters, some addressed to him and some copies of letters to the Judicial Tenure Commission, all from the public (Exhibit 14). Although I have not read these letters, their existence indicates public attention. (*see* T., vol. II, p. 99-112). The presence of media representatives throughout the formal hearing demonstrates continuing widespread public interest in the inquiry. It cannot be seriously argued that the effect of the coverage promotes a positive public attitude toward the judiciary. Respondent's active participation initially can only have contributed to a negative public image.

The allegations of paragraph 20 in the first amended complaint are proved.

Respondent's relationship with her ex-husband, even now more than ten years after their divorce, makes "The

War of the Roses" seem more like a bed of roses in comparison. She has asserted she "doesn't talk like that", and, for example, the use of the word "nigger" is "appalling" to her (T., vol. I, p. 75). She has argued these and the other words are more reflective of her deep-seated anger toward Howard Tarjeft than of a personal racist viewpoint.

At this point, the testimony of Dr. Elliot D. Luby becomes relevant. Dr. Luby conducted the mental evaluation of Respondent requested by the Examiner. Dr. Luby has been licensed to practice medicine in Michigan since 1952 and has limited his practice to psychiatry since 1954. His experience is broad and his credentials extensive. Dr. Luby spoke with Respondent for approximately an hour and a half. In addition, Respondent took the Minnesota Multiphasic Personality Inventory (MMPI), a test which Dr. Luby used to confirm the [sic] disconfirm his clinical impressions (T., vol. III, p. 14-26). Dr. Luby's testimony was most enlightening and should be reviewed in toto.

Dr. Luby noted "a suggestion of a pervasive paranoia in which she [Respondent] felt that various forces and people were determined to destroy her career and possibly her as well." (T. vol. III, p. 34.) On cross examination, Dr. Luby acknowledged that facts not available to him could certainly justify Respondent's feeling. He did not find she suffered from a major mental illness which would impair her judgment to the point of making the statements alleged in the formal complaint. When he raised this subject, Respondent was dismissive or avoided answering. (T., vol. III, p. 27). Dr. Luby determined Respondent had legitimate anger stemming from the terrible relationship with her ex-husband, and also that she was *not* controlled by him. While recognizing his ultimate conclusion could be affected by more information, Dr. Luby did note the clinical impressions he had of Respondent were essentially confirmed by the MMPI.

Dr. Luby described a mental mechanism known as "projection" which "means attributing to other people all the deficits, failures, and impulses which we disown." "Judge Ferrara seemed to blame everyone else but herself for the various problems in her life. . . . " (T., vol. III, p. 30). The significance of this projection is that the language of an angry response may be inappropriate to the source of the anger.

The testimony of Christopher Tarjeft, Respondent's 14 year-old son, reflects the acrimony between his parents. The boy and his twin brother have resided with their father since early 1997. He obviously did not wish to appear disloyal to his father while testifying.

Dee Curtis, a friend to Respondent and her children, testified to change in the two boys' demeanor at a chance encounter in August 1997, five or six months after the change of residence (T., vol. VII, p. 178-179). Tracy Arneau, another friend, testified of negative influence by Howard Tarjeft on the children (T., vol. VIII, p. 117-142).

Christopher Tarjeft testified Respondent has used the term "nigger" a few times in his presence. Once, when they discussed the prospect of living with his father, she said the change would cause him "to go to school with all the niggers." While watching a film at his grandparants' cottage two or three years ago, Respondent said – "Do you mean the nigger is the good guy in this movie?" (T., vol. III, p. 171, 172.) (The parties stipulated that had

Respondent's sister, a California resident, been able to attend this hearing she would have testified she did not see Respondent watch or comment on the movie, T., vol. IX, p. 127.)

I am not persuaded Respondent made the comment about the movie, but Christopher Tarjeft's, other remarks were credible, thus proving the allegations of paragraph 13(C) in the first amended complaint.

Christopher Tarjeft also testified that during the summer of 1997, respondent suggested he erase the tapes in his father's possession because they could affect her job if given to the Judicial Tenure Commission (T., vol. III, p. 168-169). This conversation allegedly occurred after issuance of the formal complaint. In addition, a number of copies of the tapes were in existence elsewhere. I am not convinced it took place.

Therefore, the allegation in paragraph 3 of the second amended complaint is not proved.

Respondent's refusal to testify on October 3, 1997, after being ordered to do so, was without legal justification. The particulars of that incident are set forth in the procedural history portion of this report.

I find Respondent's conduct to be in fact as alleged in paragraphs 4 and 5 of the second amended complaint.

Virtually all witnesses called by Respondent gave evidence of her character on the bench, in the work place, and in social settings.

In 1985 when Respondent was Chief Judge at the 33rd District Court, she appointed Dewayne Ross Bassette Director of Probation. Not all applicants were

African-American (testimony of Edward Nyklel, 33rd District Court Administrator, T., vol. VIII, p. 186). Mr. Bassette was the first African-American ever in that position. (T., vol. VIII, p. 57-84.)

Cheryl Cushingberry and Betty Lark, both African-Americans, clerked for Respondent at the Wayne County Circuit Court. Thomas Browne and Margaret Fasca are both Wayne County Sheriff's deputies. Georgia Bastounis was a law school intern. All have worked with Respondent at the Wayne County Circuit Court.

Edward Henry and Edward Partee, both African-Americans, are Ferrara family retainers who have known Respondent for some time. Conroy A. Stanley, Lotus Johnson, Avela Smith, and Rita Denha are all friends or acquaintances of Respondent. The first three of these witnesses are African-American and the fourth is of Middle Eastern descent.

Without exception, these witnesses testified credibly that Respondent never displayed any inappropriate demeanor toward African-Americans or persons of diverse ethnic backgrounds in their presence. None of the court staff observed disparate treatment of attorneys or litigants in court proceedings by Respondent.

Donald B. Straith, an attorney and former clerk to Respondent, was called by the Examiner. He testified that Respondent had "a short fuse" and that this temperament produced periodic problems during his eight and a half months on Respondent's staff (T., vol. III, p. 119-121). He referred to a remark made in chambers by Respondent after a jury returned a not guilty verdict in a criminal case. Although not a direct quote, the gist of the remark was: "These blacks in Detroit, if they are going to let people off on a case like this, they are going to get the crime problem they have got and they are going to get what they deserve . . . " He has never heard Respondent use the word "nigger." (T., vol. III, p. 124-125.)

Both Straith and Deputy Browne testified about an instance when a juror had taken copies of extraneous law materials into the deliberation room. Their testimony was at variance as to who was to have notified Respondent. This incident has no probative effect on these proceedings and is more indicative of an unhappy employment situation for Straith than of judicial misconduct by Respondent.

Michael Alan Flack, another attorney, testified he has had at least two cases before Respondent, served as treasurer in one of her election campaigns, and has assisted her in a legal matter. He has never seen evidence of racial or ethnic prejudice by Respondent during his contacts with her.

Joan LeBlanc, one of Respondent's witnesses, testified almost reverentially about Respondent's compassion toward her daughter who was a litigant, probably a criminal defendant. Mrs. LeBlanc felt Respondent's actions saved her daughter's life (T., vol. VIII, p. 169).

Respondent was assigned to hear a criminal case involving ethnic intimidation and granted a defense motion to dismiss (Exhibit 18A), a decision ultimately reversed by the Michigan Court of Appeals (Exhibit 18B).

After reviewing the above Exhibits and considering the testimony of Respondent's character witnesses, I find no unambiguous evidence to suggest that Respondent ever displayed racial prejudice or ethnic bias while on the bench or in her public and social life.

Respondent called four witnesses whose testimony was either not allowed or not competent for the purpose stated. Wayne County Circuit Judge Diane Marie Hathaway and Macomb County Circuit Judge Mary Chrzanowski are both acquainted with Respondent but have no first-hand knowledge of her conduct on the bench or special qualification to comment on the effect of remarks by Respondent on the overall public perception of the judiciary. Judge Hathaway did testify that her courtroom has been unaffected by allegations against Respondent (T., vol. IX, p. 98). Robert C. Maul was not allowed to testify about a bugging device allegedly placed on Respondent's telephone and events contributing to Respondent's state of mind toward her ex-husband. Lee Danielson Zohrob, an attorney, was called to testify about disparate treatment by the Judicial Tenure Commission of complaints against women judges. The testimony of this witness was not allowed as the forum is inappropriate (T., vol. IV, p. 20-26).

Respondent's first witness was Avela Smith, an African-American woman, who encountered Respondent at a 1994 political rally on Belle Isle in Detroit, Ms. Smith was stranded and Respondent gave her a ride home from the Island. The two had not met before and had no contact until 1997 after public reports of the statements which led to this hearing. (Ms. Bastounis testified calls from Ms. Smith began in March 1997, (T., vol. VIII, p. 66.) Ms. Smith offered to testify on Respondent's behalf.

No [sic] only did Ms. Smith testify about the above act of kindness, but also that there was no suggestion of racism in Respondent's conduct toward her.

The witness stated her concern of the adverse media coverage and that she unsuccessfully tried to have her supportive view aired. She decided to send a letter expressing these sentiments to the *Michigan Chronicle.*

This letter (Exhibit H2) was produced at the formal hearing and the Examiner given the opportunity to read it and voir dire Ms. Smith. During his questioning, the witness could not define "subterfuge," a word contained in the letter. She also indicated the letter had been written only two weeks earlier, after the hearing had begun. Because of her poor penmanship, she had the letter written down by another. Her reluctant answer as to the identify [sic] of the scrivener was Respondent herself!

Had it not been for the Examiner's voir dire, I am doubtful that the letter's recent vintage would have been revealed or, indeed, that it has essentially been drafted by Respondent. Respondent later testified she has gone over its content with Ms. Smith and confirmed the sentiments it contained (T., vol. IX, p. 51-53).

Although Ms. Smith hesitated in divulging Respondent as the scrivener of this letter, she was not a dishonest witness. Her hesitation suggested to me that she sensed some impropriety in the process by which the letter was created and used.

It is clear from Respondent's defense that she placed great importance on the testimony of character witnesses and understandable concern over negative publicity and negative correspondence received by Judge Rashid. It is equally clear from her later testimony that she gave little or no thought to the consequences associated with her participation in the production of the Smith letter or that its existence would have a negligible evidentiary impact on the outcome of the formal hearing.

I find from the above that the Examiner has proved the allegations of paragraphs 2, 3, 4, 5, and 6 of the third amended complaint.

A recent *New Yorker* cartoon depicted a crystal ball gazer predicting that "in the future, everyone will have privacy for 15 minutes." As intrusive as the world and its media can be in the private lives of public figures, and all too often nonpublic figures, one hopes the prediction will not come true.

We are entitled to regard telephone conversations as private, and the exceptions carved out by legislators and courts are limited. The exception permitting use of the tapes in this hearing may not preclude Respondent from seeking legal redress in another forum.

Her status as a judge invites, indeed requires, scrutiny beyond that given to the average person. The Michigan Supreme Court has held that the goal of protecting the public by maintaining the standards and fitness of the judiciary can supersede personal rights of privacy. *In re Seitz,* 4412 Mich 590 (1993).

Respondent has attempted to assert that the epithets she used were inoffensive because they were not meant. But the use of those words provoke an almost instantaneous universal negative perception. The maelstrom of publicity resulting from the release of these tapes belies her assertion, particularly since she is a judge. What she meant was subsumed in how the remarks were perceived.

The Examiner argues that this speech is in fact conduct. This may not be legally true. However, the immediate unassailable effect of widespread dissemination of this speech is the appearance of impropriety contrary to Judicial Canon 2(A).

The testimony of Victoria Roberts, immediate past president of the State Bar of Michigan makes this manifest. Ms. Roberts' term of office began September 1996 and ended September 19, 1997. As part of her duties, she traveled around the state, visiting and addressing general and special purpose bar associations. She responded to media requests about State Bar activities. She was in a unique position to discern whether there was any public or professional impact generated by the allegations made about Respondent. And she found it – as far away as Berrien County, Kalamazoo, and Midland where she found embarrassment and concern about the integrity of the judicial system and the impact of these remarks upon public confidence in the fairness and impartiality of judges. Ms. Roberts was contacted by representatives of the media and asked to comment about the situation. She also authored an article at the invitation of the *Detroit Free Press*. (*see* T., vol. II, p. 3-33; Exhibit 8A.)

Victoria Roberts described a campaign implemented by the State Bar during her stewardship to improve the public image of lawyers and judges and how offensive remarks eroded both the effectiveness of the ongoing campaigns and her personally in the Detroit legal community.

> "And so when there are statements made, even if they are off the record, when there are statements made such as the ones that have been attributed to Judge Ferrara off the record, I think it is very difficult for members of the public to believe that those are just private views that will not somehow seep into the decision making process.
>
> "And that was the opinion expressed to me not only by blacks but by white judges and lawyers as well who are tremendously concerned, and by members of the public, who are tremendously concerned that the type of impartiality that judges should have would not be exhibited by Judge Ferrara because she holds these personal views.
>
> "They affected me on several levels. Personally, being a black woman, I was offended that Judge Ferrara if she made the remarks would categorically refer to the entire City of Detroit, for instance, as niggertown, or that she would refer to a black female judge as a nigger. I feel personally offended by that.
>
> "But as an attorney, I believe that the remarks were remarks that do hold our entire profession up to contempt and scorn. I think that it is very difficult for members of the public to necessarily separate out the one person from the entire profession. We find it time and time again when there is a bad apple, the entire profession is – People believe that it is not just that person but that it is far reaching.

> "So I do believe that the public perception of our profession was ratcheted down as a result of the dominating attention that was given to the remarks allegedly made by Judge Ferrara."
>
> (T., vol. II, p. 43-50.)

Respondent's own witnesses were troubled by derogatory terminology. Conroy Stanley regards "nigger" as offensive (T., vol. VII, p. 173). Cheryl Cushingberry said certain knowledge that Respondent used offending words "would change my whole perception of her completely" (T., vol. VIII, p. 154). Deputy Thomas Browne implied that such usage would affect his willingness to work in her courtroom and raise concern about her fairness (T., vol. VIII, p. 82).

Throughout the formal hearing, Respondent's conduct was more often like that of a litigant unfamiliar with the courtroom milleu unused to maintaining appropriate decorum. She often made *sotto voce* comments on testimony, snickered or sneered at the Examiner, left the witness stand without permission, and simply left the courtroom. She was routinely late. While recognizing the inherent stress of these proceedings, Respondent's demeanor and conduct far exceeded excusable levels.

Paragraphs 10, 14, 19, and 21 of the first amended complaint, paragraph 6 of the second amended complaint, and paragraph 7 of the third amended complaint set forth the rules and canons against which Respondent's conduct is to be measured.

On all proven counts, I find Respondent violated MCR 9.104(1), (2), (3), and (4); 9.105(A); and 9.105(C)(4). In addition, she has violated Canons 1, 2(A), and 2(B) of the Michigan Code of Judicial Conduct. Her speech and actions have been patently prejudicial to the administration of justice. Her conduct during the hearing, particularly the contempt and attempted introduction of a spurious letter, demonstrate indifference to personal obedience to the law. The conversations cited in paragraphs 1 through 9 of the first amended complaint occurred during the campaign year 1992 when she was also a visiting judge and, thus, violated Canon 7(B)(1)(a).

She offered no evidence on this record that she responded to the Commission's 28-day letter other than a vague belief (T., vol. I, p. 43-44.) that she had answered. Paragraph 23 of the first amended complaint is proved and MCR 9.104(7) violated. Her public misrepresentations after release of the tapes to the media violated MCR 9.104(6).

Although unsuccessful, her attempt to introduce a misleading and spurious letter is a fabrication of evidence, fraud, and obstruction of justice as alleged in the third amended complaint. *People v Coleman*, 350 Mich 268 (1957).

With the exception of the unproven count, each proven count does constitute a separate and distinct breach of the duty imposed upon Respondent by the Michigan Supreme Court as alleged in paragraph 22 of the first amended complaint.

Dated: January 5, 1998

/s/ Vesta Svenson
Vesta Svenson, Master

STATE OF MICHIGAN
IN THE SUPREME COURT

COMPLAINT AGAINST:	FORMAL COMPLAINT NO. 52
HON ANDREA J. FERRARA Judge, Third Circuit Court Detroit, Michigan 48226	

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DECISION AND RECOMMENDATION FOR ORDER OF DISCIPLINE

At a session of the Michigan Judicial Tenure Commission held on the 9th day of February, 1998 at which the following Commissioners were

PRESENT: Henry Baskin, Esq.
Hon. Marianne O. Battani
F. Philip Colista, Esq.
Hon. Theresa Doss
Mrs. Sibyl M. Ellis
Hon. Barry M. Grant
Hon. M. Richard Knoblock
Hon. William B. Murphy
Mrs. Joanne McPherson

On June 11, 1997, the Honorable Vesta Svenson was appointed as Master to preside over the hearing of Formal Complaint No. 52, as amended, filed by the Commission against Hon. Andrea J. Ferrara, Third Circuit Court Judge, Wayne County, Michigan. Following the hearing and written closing arguments, the Master submitted her report of January 5, 1998.* The Examiner and Respondent each filed written objections to the Master's Report, and supporting briefs.

. On February 9, 1998, the Commission heard Oral Argument on the objections to the Master's Report by the Examiner and Respondent's counsel. Upon careful consideration of the Master's 22 page report, evaluation of the record and exhibits, and review of briefs filed by the Examiner and Respondent, and having heard oral argument, the Commission adopts the Master's findings of fact and conclusions of law, including all evidentiary rulings, except as otherwise noted herein:

> 1. The Master found that there was no unambiguous evidence to suggest that Respondent ever displayed racial prejudice or ethnic bias while on the bench.
>
> While the Commission agrees with the Master's comments, the Commission notes that Formal Complaint No. 52, as amended, does not charge Respondent with misconduct on the bench and therefore that issue was never litigated.
>
> 2. The tape recordings of Respondent's comments were requested by the Commission after they became publicly disclosed by the media. The Commission ultimately subpoenaed the original tapes for prehearing testing by both parties and for the introduction of evidence at the hearing.

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* A report with typographical corrections only, and with no substantive changes, was subsequently filed.

3. The Master misstated, on page 21 of her report, that Respondent violated MCR 9.105(A) and MCR 9.105(C)(4), apparently instead of MCR 9.205(A) and MCR 9.205(C)(4). The Commission finds, in any event, that Respondent did violate MCR 9.205(A) and MCR 9.205(C)(4).

4. The Commission agrees with the Master's conclusion, on pages 7-8 of her report, that Respondent's voice and words are heard on the tape recordings. The Commission further notes that at the hearing before the Commission which took place on February 9, 1998, Respondent's counsel admitted that Respondent had made the tape recorded statements at issue in this case.

The Commission notes that independent of the racial and ethnic slurs the Respondent engaged in other serious acts of misconduct:

a. Respondent publicly misrepresented that the tapes were "fake" when she knew she had made the statements and had, in fact, premised a $100,000,000 lawsuit on the fact that she had been tape recorded while making the statements;

b. Respondent attempted to perpetrate a fraud upon the court in the form of a fabricated letter she attempted to introduce through her witness, Avela Smith, constituting fabrication of evidence and obstruction of justice; and

c. Respondent's conduct throughout the formal hearing was inappropriate, unprofessional, and demonstrated a lack of respect for these proceedings.

The Commission finds that the Honorable Andrea J. Ferrara has engaged in conduct clearly prejudicial to the administration of justice and misconduct in office within the meaning of Michigan Constitution 1963, Art VI § 30, as amended, and MCR 9.205. By her racist remarks and racial and ethnic slurs, her public misrepresentations, her conduct at the hearing, her fabrication and misrepresentation of evidence, Judge Ferrara has violated standards of professional and judicial propriety governing her behavior. Aside from the bigoted comments, Judge Ferrara's conduct, before and during the hearing, independently warrants the most severe sanction. By her conduct Judge Ferrara has seriously eroded the public confidence in the judiciary of this state.

In light of the serious nature of Judge Ferrara's conduct and its negative impact on the administration of justice and the judicial system, as well as violations of the Michigan Code of Judicial Conduct, this Commission finds that Judge Ferrara should be removed from judicial office.

WHEREFORE, IT IS RECOMMENDED to the Supreme Court of Michigan that the Hon. Andrea J. Ferrara be removed from office.

JUDICIAL TENURE COMMISSION
OF THE STATE OF MICHIGAN

/s/ M. Richard Knoblock
HON. M. RICHARD KNOBLOCK,
CHAIRMAN

/s/ Marianne O. Battani
HON. MARIANNE O. BATTANI
/s/ Theresa Doss
HON. THERESA DOSS
/s/ Barry M. Grant
HON. BARRY M. GRANT
/s/ William B. Murphy
HON. WILLIAM B. MURPHY
/s/ F. Philip Colista
F. PHILIP COLISTA, ESQ.
/s/ Sibyl M. Ellis
MRS. SIBYL M. ELLIS
/s/ Henry Baskin
HENRY BASKIN, ESQ.
/s/ Joanne McPherson
MRS. JOANNE MCPHERSON

DATED: FEBRUARY 9, 1998

Michigan Supreme Court
Lansing, Michigan 48909

OPINION Chief Justice
Conrad L. Mallett, Jr.

Justices
James H. Brickley
Michael F. Cavanagh
Patricia J. Boyle
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor

FILED JULY 28, 1998

IN RE HONORABLE ANDREA J. FERRARA,
JUDGE, THIRD CIRCUIT COURT.

MICHIGAN JUDICIAL TENURE COMMISSION

Complainant,

v No. 109593

HONORABLE ANDREA J. FERRARA,

Respondent,

BEFORE THE ENTIRE COURT

WEAVER, Justice.

Judge Andrea J. Ferrara, respondent, has served as judge in the Third Judicial Circuit Court in Wayne

County since January 1993.[1] On February 9, 1998, the Judicial Tenure Commission recommended that she be removed from office for the remainder of her term. We review this matter pursuant to Const. 1963, art. 6, § 30,[2] and accept the recommendation that respondent should be removed from office because her conduct "before and during the hearing, independently warrants the most severe sanction."[3]

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[1] Respondent's current term expires in 2001. Before her service as a Third Circuit judge in Wayne County, respondent served as a 33rd District Court judge from January 1981 through 1986. She was not reelected to this post, but did serve as a judge by appointment in the 36th and 19th District Courts in Wayne County.

[2] Article 6, § 30 provides in relevant part:

> On recommendation of the judicial tenure commission, the supreme court may censure, suspend with or without salary, retire or remove a judge for conviction of a felony, physical or mental disability which prevents the performance of judicial duties, misconduct in office, persistent failure to perform his duties, habitual intemperance or conduct that is clearly prejudicial to the administration of justice.

[3] We adopt the commission's recommendation for removal from office, "in view of the egregiousness" of respondent's conduct, and must note that, in so doing, "we are not so cynical about the electoral or appointive process that we are concerned about the respondent's re-entry upon the judicial scene." *In re Callanan*, 419 Mich. 376, 389, 355 N.W.2d 69 (1984). See also 437 Mich. 29-30.

Furthermore, it should be clear that, should respondent decide to seek election to judicial office, respondent cannot be characterized as an incumbent because she has been removed, not merely suspended, from office.

Respondent's behavior from the time the newspaper medium made public the contents of the tapes containing racial and ethnic slurs made by the respondent, through the judicial misconduct hearing, and up to respondent's statements to this Court at her appeal hearing, reveal that respondent has neither the temperament, judgment, nor character to be a member of the judiciary. Our decision is not based on the actions that led to the initial charges of misconduct, the racial and ethnic slurs made by respondent in private telephone conversations with her ex-husband on eleven occasions between 1992 and 1993. Instead, our finding of misconduct meriting removal is premised upon respondent's conduct after the derogatory statements were made public by the press and other media. Thus, it is not necessary to adopt the commission's finding regarding these statements or to determine whether the tapes were properly admitted in light of the federal Wiretapping Act, 18 U.S.C. § 2515.[4]

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[4] Similar reasoning was employed by this Court in *In re Leon Jenkins*, 437 Mich. 15, 28-29, 465 N.W.2d 317 (1991), where we stated:

> While the unique character and purpose of judicial disciplinary proceedings might incline us not to apply the exclusionary rule in this context, we need not reach that conclusion in this case. The record contains more than ample evidence, apart from the recorded conversations, to support the findings of the master and the commission.

In that case, we held that, even if the recordings were erroneously admitted, we find no miscarriage of justice, given the strength of the independent grounds for discipline. Therefore, according to MCR 9.203(D), the investigation or disciplinary proceedings could not be later found invalid. *Id.* at 29.

Although we do not base our judgment on the statements, and therefore do not reach the respondent's defenses regarding them, we unequivocally state our view that whatever respondent's right to her own private opinion, a person harboring and communicating such revolting views is unworthy of holding the privileges and responsibilities of public office. Indeed, the mean-spirited, crude, and biased nature and tone of the statements that were made public are inexcusable and unacceptable from a judge. See, e.g., *In re Bennett*, 403 Mich. 178, 199, 267 N.W.2d 914 (1978).

I. FACTS

This proceeding against respondent, Third Circuit Judge Andrea J. Ferrara of Wayne Circuit Court, stems from the highly inflammatory contents of eleven recordings,[5] which were made public on February 19, 1997, by a

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[5] The original recordings were made by respondent's ex-husband, Howard Tarjeft, from whom respondent was divorced in 1985. The excerpts printed in the press were from a tape containing damaging excerpts of conversations between the ex-spouses that Tarjeft recorded in 1992 and 1993, while respondent was running for office and after she was elected. He turned the tapes over to the newspaper as part of an on-going and very hostile battle between the ex-spouses over custody of their minor twin sons.

The separation agreement awarded joint custody of the boys to respondent, sole personal custodian, and Tarjeft was ordered to pay the minimum allowance in child support. That order was never modified. However, respondent and Tarjeft initiated numerous legal battles over the years as a result of their on-going custody disputes. Respondent is currently seeking payment of allegedly significant arrearages and has

Detroit newspaper article entitled, "Recordings indicate judge slurred Jews, blacks and others." The article reported that in seven of those conversations Ferrara, who is white, used the word "nigger" or variations, and also made other racial and ethnic slurs. The article read in part:

> She used the word to criticize a black circuit court judge, question the loyalty of a black political supporter and complain about a coworker at the U.S. Immigration and Naturalization Service, where Ferrara worked as a trial attorney from 1988 to 1992.
>
> Ferrara also used the word to express concern about people who might show up if she had a garage sale or those her children might encounter if Tarjeft took them shopping at a mall or camping at a Detroit-area park.
>
> She also used the derogatory remark to express concern that her ex-husband's car might break down with the children in it in a predominantly black neighborhood.
>
> "Well all you need is a breakdown in niggertown," Ferrara said.
>
> In another conversation, Ferrara called her husband a vicious person with a sick mind.
>
> "You're probably part black," Ferrara said. "You are, I think you are. I think you've got nigger blood in you."

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alleged, inter alia, that Tarjeft is guilty of kidnaping and filing frivolous complaints with social services alleging abuse and neglect. Tarjeft has filed various civil, professional, and criminal claims against respondent as well.

> "Maybe I do," Tarjeft said. "Maybe there's some Sicilian blood in the background, who knows."
>
> "I know there is and that's nigger." Ferrara said. "So, that's why you're as sick as you are."
>
> Ferrara called a circuit court judge with whom she was unhappy a "little whore Jew."
>
> She also said she was depressed that an Arab family had moved nearby and said she didn't want to live across the street from "a bunch of you-know-whats." She said, "They sit there and sit on the porch gaggling. . . . "

These statements were recorded in 1992 and 1993 by respondent's ex-husband, Tarjeft, who made the recordings in an apparent attempt to gain ammunition for his very hostile custody battle with respondent over their twin minor sons. Respondent claims that in September 1996, to avoid an arrearage hearing, Tarjeft extorted respondent by threatening to destroy her career by releasing the tapes should she not capitulate to his demands regarding the arrearages, custody arrangement, and a fee dispute with another attorney. Tarjeft told the press that he made the tapes to level the playing ground between the ex-spouses. He apparently felt he was at a constant disadvantage to respondent in legal proceedings given her position as a judge.

After the publication of the statements made by respondent, the Judicial Tenure Commission initiated an investigation into the matter.[6]

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[6] It is undisputed that respondent never filed a formal, written response to the commission's letter of inquiry,

The investigation led to the filing of Formal Complaint No. 52 by the commission's examiner, who charged respondent with several instances of judicial misconduct for communicating racist and other ethnically discriminatory views, bias, or the appearance of bias against these racial and ethnic groups. The examiner also charged respondent with publicly misrepresenting those communications during a February 1997 press conference that respondent herself convened.[7]

In May 1997, this Court temporarily suspended respondent pending the final disciplinary determination.

On June 11, 1997, we appointed the Honorable Vesta Svenson as master to preside over the hearing of the complaint against respondent. During the course of the hearing, a second amended complaint was filed in early October 1997 to conform to the proofs pursuant to MCR 9.124, and to include charges of obstruction of justice from the October 3, 1997, proceedings. These additional charges were based on (1) testimony by respondent's minor twin son, Christopher Tarjeft, that respondent asked him to destroy the tapes, and (2) respondent's refusal to answer further questions regarding the tapes

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commonly referred to as a "28-day letter." Respondent maintains that, in essence, her failure to respond was due to a failure to communicate with her attorney, and that she was under a great deal of stress and in a state of general confusion after the release of the tapes.

[7] This original complaint was amended to include, in paragraph 13, an allegation that respondent also made racist statements to her sons and two other individuals while she was a circuit court judge. Subparagraphs 13(a) and (b) were subsequently dismissed by the examiner.

on the basis of alleged privacy rights under the federal wiretapping statute.

A third amended complaint was filed on October 29, 1997, and included additional charges of conduct clearly prejudicial to the administration of justice, fabrication of evidence, obstruction of justice, dishonesty, and fraud. These charges were based on respondent's attempts to introduce a letter purportedly written by Avela Smith, a concerned citizen who became acquainted with respondent several years before the release of the tapes and the surrounding negative publicity.

In her defense, respondent presented twenty-two witnesses, including herself. Many of the witnesses were African-Americans or of Arab descent, and were therefore members of some of the groups of which respondent spoke in the tapes. These witnesses all testified that they saw no discriminatory conduct nor heard any use of discriminatory language by respondent in the years they had known her. Several witnesses also indicated that, even if they did believe respondent made the statements in the tapes, they would not change their view of her as a fair and nonracist person.

On January 5, 1998, after nine days of hearings and after written closing arguments, the master filed a twenty-two page report that culminated in a finding that respondent was indeed guilty of the charged misconduct. Both parties filed written objections, and on February 9, 1998, following oral argument, the commission adopted the master's findings of fact and conclusions of law, including all but the following evidentiary rulings:

1. The Master found that there was no unambiguous evidence to suggest that Respondent ever displayed racial prejudice or ethnic bias while on the bench.

While the Commission agrees with the Master's comments, the Commission notes that Formal Complaint No. 52, as amended, does not charge Respondent with misconduct on the bench and therefore that issue was never litigated.

2. The tape recordings of Respondent's comments were requested by the Commission after they became publicly disclosed by the media. The Commission ultimately subpoenaed the original tapes for prehearing testing by both parties and for the introduction of evidence at the hearing.

3. The Master misstated, on page 21 of her report, that Respondent violated MCR 9.105(A) and MCR 9.105(C)(4), apparently instead of MCR 9.205(A) and MCR 9.205(C)(4). The Commission finds, in any event, that Respondent did violate MCR 9.205(A) and MCR 9.205(C)(4).

4. The Commission agrees with the Master's conclusion, on pages 7-8 of her report, that Respondent's voice and words are heard on the tape recordings. The Commission further notes that at the hearing before the Commission which took place on February 9, 1998, Respondent's counsel admitted that Respondent had made the tape recorded statements at issue in this case.

The commission found that respondent engaged in misconduct within the meaning of Const. 1963, art. 6, § 30, as amended, and MCR 9.205.

> By her racist remarks and racial and ethnic slurs, her public misrepresentations, her conduct at the hearing, her fabrication and misrepresentation of evidence, Judge Ferrara has violated standards of professional and judicial propriety governing her behavior. Aside from the bigoted comments, Judge Ferrara's conduct, before and during the hearing, independently warrants the most severe sanction. By her conduct Judge Ferrara has seriously eroded the public confidence in the judiciary of this state.
>
> In light of the serious nature of Judge Ferrara's conduct and its negative impact on the administration of justice and the judicial system, as well as violations of the Michigan Code of Judicial Conduct, this Commission finds that Judge Ferrara should be removed from judicial office.

II

Under Const. 1963, art. 6, § 30 and MCR 9.223-9.225, we are charged with reviewing this matter. Our de novo review[8] of the extensive record convinces us that the master effectively insured that the hearing was conducted in a fair and proper manner, and that it conformed as nearly as possible to the rules of procedure and evidence governing trial of civil actions in circuit court. MCR 9.211(a).

Respondent cites approximately forty-seven specific objections to the master's report. We find it unnecessary to address the objections regarding admission of the tapes into evidence because our conclusion is based solely on the other grounds of misconduct. As to the remaining issues, we find respondent's arguments without merit and decline to address them except where necessary to the discussion of grounds that support our finding of misconduct.[9]

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[8] *In re Somers*, 384 Mich. 320, 182 N.W.2d 341 (1971).

III. GROUNDS FOR MISCONDUCT

There are two sources that establish the standards of judicial conduct. MCR 9.205 sets forth the grounds for a finding of judicial "misconduct" and the possible forms of discipline that can be imposed for misconduct. In relevant part, MCR 9.205(C) provides:

> (C) Misconduct. A judge is guilty of misconduct in office if:
>
> (1) the judge is convicted in the United States of conduct which is punishable as a felony under the laws of Michigan or federal law;
>
> (2) the judge persistently fails to perform judicial duties;
>
> (3) the judge is habitually intemperate within the meaning of Const. 1963, art. 6, § 30;
>
> (4) the judge's conduct is clearly prejudicial to the administration of justice. . . .

The other source governing judicial conduct is the Code of Judicial Conduct. In relevant part, those canons provide:

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[9] Furthermore, we do not base our decision on Christopher Tarjeft's testimony, given its obvious inconsistencies and indicia of bias in favor of the boy's father, Tarjeft.

> Canon 1 A judge should uphold the integrity and independence of the judiciary.
>
> * * *
>
> Canon 2 A judge should avoid impropriety and the appearance of impropriety in all activities.
>
> A. Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.
>
> B. A judge should respect and observe the law. At all times, the conduct and manner of a judge should promote public confidence in the integrity and impartiality of the judiciary. Without regard to a person's race, gender, or other protected personal characteristic, a judge should treat every person fairly, with courtesy and respect.

A finding of misconduct under the court rules and judicial canons must be based on a preponderance of the evidence. *In re Leon Jenkins,* 437 Mich. 15, 18, 465 N.W.2d 317 (1991); *In re Loyd,* 424 Mich. 514, 522, 384 N.W.2d 9 (1986).

As previously stated, the commission adopted the master's finding and recommended that respondent be removed from the bench because of the following acts of misconduct: "her racist remarks and ethnic slurs," as well as "her public misrepresentations, her conduct at the hearing, her fabrication and misrepresentation of evidence." At this stage of the judicial discipline proceedings, we must consider whether to adopt the commission's recommendation.

The commission found that respondent committed misconduct by publicly misrepresenting that the tapes were "fake" at her press conference, attempting to introduce a fraudulent letter into evidence and thereby perpetrating a fraud on the court, and engaging in conduct throughout the proceedings that was "inappropriate, unprofessional, and demonstrated a lack of respect" for those proceedings.

A. Statements to the Press and the Public

The commission adopted the master's findings of fact to support the charge of misconduct on the basis of respondent publicly misrepresenting that the tapes were " 'fake' when she knew she had made the statements and had, in fact, premised a $100,000,000 lawsuit on the fact that she had been tape recorded while making the statements. . . . "

On February 19, 1997, respondent called a televised news conference and stated: "The tapes are a fake. I have listened to the tapes and that is not my voice contained on those tapes." While she told this Court that she did in fact listen to the tapes before this conference, her testimony to the master, though often conflicting and evasive, indicated she only listened to some of the taped conversations in her attorney's office before this press conference. Because she did not listen to the tapes in their entirety or have them examined, she could not honestly and conclusively state that her voice was not on the tapes and that they were fakes. More importantly, respondent later clarified that she did, in fact, recognize her voice on some portions of the tape.

While simultaneously denying that her voice was on the tapes, respondent filed a federal suit against the paper that originally published the taped statements, the reporter who authored the article, and Tarjeft.[10] Paragraph 11 of that verified complaint, signed by respondent, stated unequivocally that the taped conversations did, in fact, contain respondent's voice.

This Court recognized in *In re Tschirhart,* 422 Mich. 1207, 1209-1210, 371 N.W.2d 850 (1985), that

> "[t]he proper administration of justice requires that the Commission view the Respondent's actions in an objective light. The focus is necessarily on the impact his statements might reasonably have upon knowledgeable observers. Although the Respondent's subjective intent as to the meaning of his comments, his newly exhibited remorsefulness and belated contrition all properly receive consideration, any such individual interests are here necessarily outweighed by the need to protect the public's perception of the integrity of the judiciary."

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[10] The suit was filed on March 20, 1997. Case No. 97-71136. The paper and the reporter subsequently were dismissed from the suit on May 6, 1998; however, the action against Tarjeft is ongoing.

In this case, respondent has reduced the number of considerations because she never exhibited true remorsefulness for her misleading comments to the public and has never shown that she understands the damage to the judiciary that occurs when a judge offers, as fact, public statements that are not reasonably supported, researched, investigated, or believed to be true.

Respondent displayed a similar disregard for the truth, as well as a lack of candor with the tribunal, when she answered questions before the master and this Court regarding whether she uttered the ugly words disseminated to the public by, and attributed to her in, the press. In fact, the only time respondent has ever accepted responsibility for uttering the taped statements was not by her own accord, but by an admission of her counsel during oral argument before the commission regarding the master's recommendations on February 9, 1998. However, when respondent appeared before this Court to appeal the commission's recommendation, she refused to directly answer questions regarding whether her voice uttered the racist statements on the tapes. She told this Court that the "taped conversations were in the nature of personal and private disputes with my ex-husband before I became a circuit court judge."[11] Respondent then made

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[11] This assertion is not true, because some of the taped conversations occurred after January 1, 1993, when respondent assumed the Third Circuit bench. Respondent seemed to understand this point, as she admitted it in her brief to this Court.

We not only question the accuracy, but also the relevancy of this assertion. MCR 9.205(E) clearly states that conduct that occurred "before or after the respondent became a judge" may the following nonsensical statement that would indicate a total failure by respondent to accept what every judge must be able to recognize, the overwhelming weight of the evidence, which in this case indicates that she did make such statements.[12] Respondent stated:

> I deeply regret having said any of the comments attributed to me on the tapes. I never intended to offend.[13]

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be the subject of disciplinary proceedings and may, therefore, constitute "misconduct in office."

[12] The tapes were authenticated and declared unaltered by two experts, one of the commission's choosing and the other of respondent's. Further, the master and the commission found the voice on the tapes to be hers, as did several of the witnesses who testified in respondent's case in chief.

[13] When pressed regarding the meaning of this curious statement, respondent engaged in the following exchange:

> *Justice Boyle:* I beg your pardon, attributed to you?
>
> *Judge Ferrara:* Yes, attributed to me on the tape. Yes.
>
> *Justice Boyle:* Attributed to you?
>
> *Judge Ferrara:* May I finish my statement or not?
>
> *Justice Weaver:* Did you say them or not? That's what [the] Justice . . . wants to know. . . .
>
> *Judge Ferrara:* Did I say those things? I have no recollection of saying those things and there's been a finding that I said those things, and I deeply regret having said those comments. I can't deny that that sounds like my voice on that tape. I honestly do not remember saying those things. Those comments and statements are totally out of character. . . . And I can attest that nobody, nobody has ever heard me talk like that ever.

In refusing to accept responsibility for her comments, respondent ultimately deprived herself of the opportunity to truly and sincerely apologize for her conduct. Her unsupportable denials and inconsistent statements to the media, the public, the commission, and this Court stand as clear evidence of her inability to be forthright, to avoid appearances of impropriety, and to fulfill the ethical obligations of a judicial officer, who must be

> "perceived to be a person of absolute integrity. When a judge's character and morals come into question not only do the people lose respect for him as a person, but worse, respect for the Court over which he presides is lost as well." [422 Mich. 1211.]

Her statements to the press and the public, as well as to the master and this Court, have clearly prejudiced the administration of justice, evidence a fundamental lack of respect for the truth-seeking process, and, furthermore, if left unrebuked, threaten to severely compromise the public's confidence in the judiciary's integrity. Accordingly, we find respondent's actions to constitute misconduct in violation of Canons 1, 2A, 2B, and MCR 9.205(C)(4).

Justice Weaver: . . . Do you admit that you said it on the tape or not. It's simple. Either yes or no.

Judge Ferrara: If I said those words, they were spoken in the heat of the moment and do not reflect my attitudes or beliefs.

Justice Weaver: Still "*if*." [Emphasis added.]

B. Attempt to Introduce a Fraudulent Letter – Twice

The commission further found that respondent attempted to fabricate evidence, obstruct justice, and "perpetrate a fraud upon the court in the form of a fabricated letter she attempted to introduce through her witness, Avela Smith. . . . "[14] Specifically, the commissioner alleged that respondent had attempted to mislead the court, or at least create a false impression, with respect to the time, motivation, and scrivener of the letter.

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[14] The examiner's second and third amended complaints alleged that respondent obstructed justice on three separate occasions. We only address the allegation contained in the examiner's third amended complaint regarding a letter that respondent attempted to introduce through witness Avela Smith. The letter is as follows:

> JUDGE FERRARA IS NO RACIST
>
> It is said that actions speak louder than words. Avelia [sic] Smith, a Detroit resident says she's fed up with the one-sided bias reporting of Judge Ferrara by the Detroit Free Press. "Judge Ferrara is no racist" says Avelia [sic] Smith. "I know her to be a decent and kind person." Ms. Smith reports that in August 1994 she attended a political rally at Belle Isle and was stranded with no way home. She had asked several people for help and was turned down. Ready to give up all hope, she approached a woman who she did not know. The woman readily agreed to give her a ride and drove her home to VanDyke & Mack area. This good deed was not forgotten. In March 1997, Avelia [sic] was watching the evening news and immediately recognized the woman who extended an act of kindness to her 3 years ago. It was Judge Andrea J. Ferrara.

Respondent's first witness was Avela Smith, an African-American woman, whom she first encountered at, and subsequently drove home from, a 1994 political rally on Belle Isle in Detroit. Ms. Smith testified that she had no subsequent contact with respondent until 1997, after the statements were published. After hearing the

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> Avelia [sic] Smith tried to reach Judge Ferrara at her office to lend support. However Judge Ferrara could not be reached due to a medical leave. Ms. Smith did not give up. She kept calling and finally was able to make contact with Judge Ferrara.
>
> Ms. Smith wants the Detroit community to know the kinder, gentler side of Judge Ferrara. "Giving a black woman stranger a ride home from Belle Isle does not reflect racism," says Smith.
>
> It is important to note that despite repeated attempts to contact the Detroit Free Press no one has bothered to return my calls. Apparently they only want to print what supports their agenda.
>
> Many of my friends in the Detroit community believe this is a subterfuge to divert attention away from the real racism which is the abolition of Detroit Recorders Court by the Engler Administration.
>
> Avela Smith
> # 313 521 1315
> 11413 Kenmoor
> Det Mich
> 48205

[Name and address in cursive penmanship; body of letter printed.]

negative press and charges of racist behavior leveled against respondent, Ms. Smith offered to testify on respondent's behalf.

Days before testifying, and well after the hearings began, Ms. Smith and respondent met at a Detroit-area McDonalds restaurant to draft a letter purportedly meant to be sent to the "Michigan Chronicle." At no point before moving for admission of the letter was the recent date of the letter or the identity of the scrivener elicited. It was only after respondent's counsel moved to admit the letter that, on voir dire, the examiner uncovered the critical facts regarding the timing of the letter and identified the scrivener as the respondent.[15] Furthermore, the examiner revealed, on voir dire and later on cross-examination, that the witness could neither define the term "subterfuge" nor explain the political reasoning behind the statements contained in the last paragraph of the letter. The master found the witness to be credible, but that

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[15] Ms. Smith's testimony on direct examination and the corresponding and illuminating voir dire are, in relevant part, as follows:

> *Q.* . . . Let me show you what has been marked as Exhibit H and ask if that is a letter which you wrote to a newspaper?
>
> *A.* Yes, I had someone write it out for me because my handwriting is not to [sic] legible, and I signed it.
>
> *Q.* The person who wrote that out, did they do so at your request?
>
> *A.* Well, yes, I requested it.
>
> *Q.* And to what newspaper was that addressed?
>
> *A.* To the Chronicle.
>
> *Q.* Do you know whether it was published or whether there are plans for publication?
>
> *A.* Well, I talked with Sam Logan and he said there are plans for publication.

* * *

> [h]ad it not been for the Examiner's voir dire, I am doubtful that the letter's recent vintage

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VOIR DIRE

Q. What does the word "subterfuge" mean?

A. "Subterfuge?"

Q. Yes.

A. I don't know.

Q. You don't know?

A. No. Would you tell me what it means?

Q. Not at this time. Who wrote this letter?

A. Well, someone wrote it. A friend. Q. Who is the someone?

A. A friend.

Q. Who is the friend?

A. I had rather not say.

Q. Well, you are under oath and you are obligated to say. So would you please tell the Court who it is that wrote this letter that has been marked as Exhibit H.

The Court: you have to answer, Ms. Smith.

Q. . . . Who wrote the letter, ma'am?

The Witness: I have to answer that?

The Court: Yes.

A. Well, I had Judge Ferrara write that for me.

Q. . . . And when did Judge Ferrara write it?

A. About two weeks ago.

> would have been revealed or, indeed, that it has essentially been drafted by Respondent.
>
> * * *
>
> It is clear from Respondent's defense that she placed great importance on the testimony of character witnesses and understandable concern over negative publicity and negative correspondence received by Judge Rashid. It is equally clear from her later testimony that she gave little or no thought to the consequences associated with her participation in the production of the Smith letter or that its existence would have a negligible evidentiary impact on the outcome of the formal hearing.

We agree with the commission's findings of fact and conclusion of law pertaining to respondent's attempts to introduce the letter. Judge Ferrara's failure to divulge the source and circumstances surrounding the Smith letter constitute an obstruction of justice and lack of candor with the tribunal violative of Canons 2(A) and (B) and MCR 9.205(C)(4). Judge Ferrara's silence while Ms. Smith was cross-examined regarding the source of the letter, which Smith vaguely identified as "a friend," shows a lack of candor with the tribunal. Before cross-examination, the evidence presented was clearly intended to create the false impression that the letter was written before the hearing, to respond to the negative press, and without any assistance by Judge Ferrara.[16] Respondent's counsel informed this Court that she did not tell him the critical fact that she wrote the letter when she handed it to him just moments before he called Ms. Smith to the stand.

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[16] Indeed, Smith before voir dire by the examiner, testified:

> *Q.* Do you know whether [the letter] was published or whether there are plans for publication?
>
> *A.* Well, I talked with Sam Logan and he said there are plans for publication.

As if to add insult to injury, respondent made a second attempt to admit the contents of the Smith letter. Only two days after the initial attempt to admit the letter, respondent secured another letter, expressing the same sentiments as the original, from the witness' house. This second letter differed from the first by containing a date, October 29, 1997, and being written entirely in Ms. Smith's own hand-writing, as if such changes would make amends for the prior attempted fraud on the Court. Even on respondent's second attempt at admission, when questioned more directly about the political analysis contained in the last paragraph, Ms. Smith still could not explain what again were being presented as her sentiments. This second attempt at admission is glaring evidence of respondent's inability to admit her shortcomings and to conform to judicial standards of conduct. We agree that deception of this sort is " 'antithetical to the role of a Judge who is sworn to uphold the law and seek the truth'. . . . " *In re Collazo,* 91 NY2d 251, 255; 691 NE2d 1021 (1998), quoting *Matter of Myers,* 67 NY2d 550, 554; 496 NE2d 207 (1986).

Moreover, when the examiner objected to admission of the letter on the basis of relevance, respondent's counsel replied:

> *Mr. Bendure:* We have had newspaper articles admitted over our objection by the examiner and I want to get into the other side of the story.

C. Other Grounds for Misconduct

We also adopt the commission's findings that "Respondent's conduct throughout the formal hearing was inappropriate, unprofessional, and demonstrated a lack of respect" for the judicial discipline proceedings. While the incidents are too numerous to recount, such as respondent's failure to observe appropriate courtroom decorum by interrupting opposing counsel and the master on several occasions and by making snide side comments, we do note a few particularly egregious examples.

Respondent's evidence and testimony were replete with half-truths and misleading statements, such as when respondent attempted to introduce evidence that her ex-husband planted a "bug" (electronic surveillance device) on her phone line. Respondent's witness Robert Maul testified that he discovered the "bug" on her home phone line and that the "bug" was subsequently turned over to the Grosse Pointe police. Respondent also testified that Tarjeft had installed such a "bug" on her home phone line. On cross-examination, the examiner questioned respondent about her subsequent attempts to determine whether the FBI, to whom the police gave the "bug" for testing, found that the device was, in fact, operable. Initially, respondent testified that she made follow-up calls to the police roughly once a month for a year. Upon further questioning, however, she effectively recanted this claim and simply stated that she made several calls after filing the report. While respondent attempted to admit the police report, she failed to indicate that the police file also contained the FBI report regarding the "bug." That report concluded that the "bug" was not an electronic surveillance device at all, but merely a piece of metal.

On other occasions respondent's testimony was so unnecessarily vague as to hinder the proceedings and significantly interfere with the administration of justice. This misconduct is particularly evident in respondent's testimony directly after respondent agreed to resume questioning about the tapes in an effort to purge the master's civil contempt order.

This testimony came after respondent claimed privacy rights under 18 U.S.C. § 2515, the federal wiretapping statute, once the tapes were admitted into evidence. This privilege was asserted despite her voluntary statements regarding the tapes to the press, and despite her prior testimony on the subject. Respondent raised arguments similar to those heard at length and found to be unpersuasive by the master earlier in the proceedings. The master found the examiner's arguments that the federal law did not provide a privilege, and, even if it did, it was effectively waived by respondent, given her comments to the press and prior testimony, to be persuasive. Accordingly, the master granted the examiner's motion for civil contempt, but, after filing of additional memorandum, denied the examiner's request for a default. Respondent was informed that the contempt order could be purged by answering the examiner's questions regarding the tapes. Respondent agreed to answer these questions, but in so doing, respondent offered evasive testimony illustrative of her failure to accept and truly comply with the master's order. For example, respondent insisted she could not remember hearing the taped statements that were played for her in court just six days earlier and also refused to divulge her phone number when asked. The continued examination proved futile and was quickly concluded.

IV. APPROPRIATE DISCIPLINE

Judicial disciplinary proceedings are unique and "fundamentally distinct" from all other criminal or civil legal proceedings. 437 Mich. 28. The purpose of such proceedings is to "protect the people from corruption and abuse on the part of those who wield judicial power." *Id.* Our primary concern in determining the appropriate sanction is to restore and maintain the dignity and impartiality of the judiciary and to protect the public.

We adopt the commission's recommendation and find respondent's untruthful and misleading statements to the public and press, her attempt to commit a fraud on the Court by twice attempting to introduce the Avela Smith letters, and her unprofessional and disrespectful conduct during each stage of the proceedings to constitute misconduct in violation of the court rules and judicial canons.

Indeed, we demand strict compliance with the letter and spirit of these rules and canons because, without it, our judicial system, which depends on public confidence in the integrity and impartiality of the judiciary would surely fail. Judges, occupying the watchtower of our system of justice, should preserve, if not uplift, the standard of truth, not trample it underfoot or hide in its shady recesses. This is precisely why judges should be exemplars of respectful, forthright, and appropriate conduct.

The effectiveness of our judicial system is dependent upon the public's trust. Violations such as those described herein, which mislead, misrepresent, and deceive with respect to evidence and facts in legal proceedings, so seriously undermine that trust and are so fundamentally contrary to judicial temperament and obligation as to require the most severe form of discipline – removal. Our decision is based on the nature, extent, and frequency of the misconduct. Accordingly, we adopt the commission's recommendation to remove respondent because we find it is necessary to restore and maintain the dignity and honor of the judiciary and, most importantly, to best protect the public.

Pursuant to MCR 7.317(C)(3), the clerk is directed to issue the judgment order forthwith.

/s/ Elizabeth A. Weaver
/s/ Conrad L. Mallett, Jr.
/s/ Clifford W. Taylor
/s/ Patricia J. Boyle
/s/ James H. Brickley

STATE OF MICHIGAN
SUPREME COURT

IN RE HON. ANDREA J. FERRARA,
Judge, Third Circuit Court.

MICHIGAN JUDICIAL TENURE COMMISSION,
Complainant,

No. 109593

v

HONORABLE ANDREA J. FERRARA,
Respondent.

CAVANAGH, J. (*concurring*).

I concur with the result reached by the majority today. I write separately, however, to clarify the exact basis on which I reach this decision.

I

The Court has decided to base the action taken today only on conduct other than the respondent's statements as recorded on the various tapes. In doing so, the Court declines to resolve the legitimate constitutional questions raised by counsel for the respondent. I agree with this decision because prudence requires that we continue to resist addressing constitutional questions unless truly necessary. Given the action taken by the Court today, there is no need to look further and reach the constitutional questions raised by counsel for the defense.

II

Of the conduct, other than the statements, which the respondent is charged with, I base my concurrence in the sanction of removal from office on the respondent's actions regarding the Avels Smith letter. As the majority's recitation of the facts aptly demonstrates, respondent undertook a substantial amount of effort to present this letter to the master and to see that it was offered as something other than what it truly was. While respondent is clearly entitled to present a defense, and to do so vigorously, she is not entitled to attempt to perpetrate a fraud upon the master in the course of doing so. I find this conduct to violate MCR 9.205(C)(4), being conduct clearly prejudicial to the administration of justice. Furthermore, such conduct must also be found to violate the Code of Judicial Conduct, Canon 2, because it clearly presents both an appearance of, and actual, impropriety, as well as indicating a failure to respect and observe the law and promote public confidence in the judiciary.

My review of our past decisions in judicial discipline matters leads me to believe that a significant suspension would be consistent with our past decisions in these matters. Unfortunately, however, our past decisions provide only limited guidance in judicial tenure matters, where our goal must be the protection of the public and the preservation of the integrity of our judicial system. In doing so, we consider conduct that is often widely divergent, and circumstances that are sometimes unique. There are many underlying circumstances to this case, some of which we have declined to review. In attempting to relate other circumstances herein to the underlying basis for discipline, I believe the majority visits conduct that, although often distasteful and questionable, is nonetheless insufficient to amount to a basis for increased sanctions.

I decline to join in that portion of the majority opinion addressing conduct other than the Avela Smith letter. I find that our action today, however framed, is equivalent to a suspension of approximately two and one half years. Keeping this in mind, I am able to agree with the majority's decision to remove respondent from the bench. While the respondent will be able to again run for judicial office if she so chooses, like the majority, I share a faith that the electorate will have no desire to return respondent to the bench.

/s/ Michael F. Cavanagh

/s/ Marilyn Kelly

Order

Entered: October 7, 1998

Michigan Supreme Court
Lansing, Michigan

Conrad L. Mallett, Jr.
Chief Justice

James H. Brickley
Michael F. Cavanagh
Patricia J. Boyle
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Justices

Rehearing No. 419

109593

IN THE MATTER OF

HONORABLE ANDREA J. FERRARA
Judge, 3rd Circuit Court

BEFORE THE JUDICIAL TENURE COMMISSION

In this cause, a motion for rehearing is considered, and it is hereby DENIED.

[SEAL]

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

October 7, 1998 /s/ Corbin R. Davis

STATE OF MICHIGAN

BEFORE THE MICHIGAN JUDICIAL
TENURE COMMISSION

COMPLAINT AGAINST:

HON ANDREA J.
FERRARA
Judge, Third Circuit Court
Detroit, Michigan 48226
________________________/

FORMAL
COMPLAINT
NO. 52

FIRST AMENDED COMPLAINT

The Judicial Tenure Commission of the State of Michigan ("Commission") files this Complaint against Andrea J. Ferrara ("Respondent"), Third Circuit Court Judge in the City of Detroit, Wayne County, Michigan. The Commission charges acts of judicial misconduct constituting violations of the standards of judicial conduct under MCR 9.205. This action is taken pursuant to the authority of the Commission under Article VI, Section 30 of the Michigan Constitution of 1963, as amended, and MCR 9.200 *et. seq.* The filing of this Complaint has been authorized and directed by resolution of the Commission.

Respondent is currently a judge of the Third Circuit Court in the City of Detroit, Wayne County, Michigan, and has been since January 1, 1993. The acts of judicial misconduct are set forth in the following paragraphs:

(1) On May 5, 1992, prior to Respondent's election to the circuit court bench, she engaged in a telephone conversation with her ex-husband, Howard Henry Tarjeft. This telephone conversation was electronically recorded by Mr. Tarjeft, a participant in the conversation.

During this conversation, Respondent advised him that "Jennifer" (presumably Jennifer Williams with the Immigration/Naturalization Service) had used Respondent's home address in order to secure a lower automobile insurance rate. There was further discussion about "Jennifer" using Respondent's address to which Respondent commented:

> "Well this is it, I don't know. She's very, very bold. Unbelievably bold. I never seen anybody so bold and fucking pushy, she's a real nigger. A real nigger . . . "

(2) On May 5, 1992, during the same conversation referenced in paragraph (1), Respondent had the following exchange with Mr. Tarjeft:

AF – " . . . you're probably part black.

HT – "Huh?"

AF – "You're probably part black."

HT – (laughs)

AF – "You are, I think you are, I think you got nigger blood in you."

HT – "Oh, who knows, maybe you're right."

AF – "I think you really do, I think . . . "

HT – "Hey, maybe I do, maybe I do, maybe there's some Sicilian blood in the background, who knows."

AF – "I know there is, and that's nigger. . . . "

HT – "Yeah, well . . . "

AF – " . . . so, that's why you're as sick as you are."

(3) On May 13, 1992, Respondent engaged in a telephone conversation that was electronically recorded by Mr. Tarjeft, a participant in the conversation. During this conversation, Respondent and her ex-husband discussed Eastland Mall, at which time Respondent stated: "Yeah well there's niggers all over the place. Did you know that's the highest crime city in the whole State of Michigan? . . . They should . . . there's so many goddamn niggers its. . . . "

(4) On July 19, 1992, Respondent engaged in a telephone conversation that was electronically recorded by Mr. Tarjeft, a participant in the conversation. During this conversation, Respondent made derogatory remarks regarding Wayne County Circuit Court Judge Cynthia D. Stephens, stating: "She won't get elected anyway the nigger bitch."

(5) On July 22, 1992, Respondent engaged in a telephone conversation with Mr. Tarjeft regarding summer visitation/vacation for the minor children of their marriage. This telephone conversation was electronically recorded by Mr. Tarjeft, a participant in the conversation. During this conversation and in response to Mr. Tarjeft's stated desire to take the minor children to Lake Erie Metropark, Respondent stated: "Well that's full of niggers."

(6) On September 17, 1992, Respondent engaged in a telephone conversation that was electronically recorded by Mr. Tarjeft, a participant in the conversation. During the conversation, Respondent had the following exchange with Mr. Tarjeft:

AF – "We'll, I'm going to have to learn how to shoe people . . . "

HT – (laughs); and

AF – "Well I can concentrate on being fair bũt I'll tell you there's a few people out there I'd like to . . . (laughs)"

HT – "Andrea . . . "

AF – " . . . give a hard time, not, not uh . . . just give a hard time, especially that committee that rated me not qualified and I intend to get a listing of them."

(7) On September 19, 1992, Respondent engaged in a telephone conversation that was electronically recorded by Mr. Tarjeft, a participant in the conversation. During the conversation, Respondent talked about attorney William Hunter, one of her campaign supporters. Respondent commented: "Yeah and now I'm wondering about this asshole black, I'm going to tell him to just call off this damn party." She later remarked in the course of the same conversation: "Yeah, How, how do I know that this black nigger isn't involved in all of this?"

(8) On October 30, 1992, Respondent engaged in a telephone conversation that was electronically recorded by Mr. Tarjeft, a participant in the conversation. During the conversation, Respondent complained about Mr. Tarjeft's automobile, which she considered to be unreliable. She commented that: "Well all you need is a breakdown in nigger town."

(9) On November 20, 1992, Respondent engaged in a telephone conversation that was electronically recorded

by Mr. Tarjeft, a participant in the conversation. During the course of this conversation, Respondent made remarks about then Wayne County Circuit Court Judge Helene White in the following exchange with Mr. Tarjeft:

> AF – "You know I think all the black community should know about that, that'll hurt her. She's getting back at them because they didn't endorse her, the little whore Jew."
>
> HT – "Something's got to be done about this."
>
> AF – "She is nothing but a Jew whore, you know that? You know that . . . "

(10) Respondent's conduct, as described in paragraphs (1) through (9) above, constitutes:

(a) Conduct clearly prejudicial to the administration of justice as defined by the Michigan Constitution 1963, Art. VI, § 30, as amended and MCR 9.205;

(b) Failure to observe high standards of conduct so that the integrity and independence of the judiciary may be preserved, in violation of the Code of Judicial Conduct, Canon 1;

(c) Conduct involving impropriety and the appearance of impropriety, thereby eroding public confidence in the judiciary, in violation of the Code of Judicial Conduct, Canon 2(A);

(d) Failure to promote public confidence in the integrity and impartiality of the judiciary, in violation of the Code of Judicial Conduct, Canon 2(B).

(e) Failure to maintain the dignity appropriate to judicial office while a candidate for judicial office, in violation of the Code of Judicial Conduct, Canon 7(B)(1)(a); and

(f) Conduct violative of relevant portions of MCR 9.104 in that such conduct:

> is prejudicial to the proper administration of justice, contrary to MCR 9.104(1);
>
> exposes the legal profession or courts to obloquy, contempt, censure or reproach, contrary to MCR 9.104(2);
>
> is contrary to justice, ethics, honesty, or good morals, contrary to MCR 9.104(3); and
>
> violates the standards or rules of professional responsibility adopted by the Supreme Court, contrary to MCR 9.104(4).

(11) On April 15, 1993, after her election to the circuit court bench, Respondent engaged in a telephone conversation with her ex-husband, Howard Henry Tarjeft. This conversation was electronically recorded by Mr. Tarjeft, a participant in the conversation. During this conversation Respondent stated the following in an exchange with Mr. Tarjeft:

AF – "Well, I would like to have a toy sale, those toys sell quick because people buy toys."

HT – "Andrea, do you really need the money? You don't. Why expose yourself like that?"

AF – "You mean to niggers?"

(12) On April 26, 1993, after her election to the circuit court bench, Respondent engaged in a telephone conversation that was electronically recorded by Mr. Tarjeft, a participant in the conversation. During this conversation, Respondent complained about her neighbors in an exchange with Mr. Tarjeft, as follows:

AF – " . . . I've got Arabs living across the street.

HT – "Yeah, so? What's wrong with that?"

AF – "A whole slew of them."

HT – "What's wrong with that? They're good people."

AF – "From the Sudan.

HT – "They're good people, for the most part they're good people. It doesn't really matter what their nationality is, if they're good people that's all that counts."

AF – "I don't know if they're good people. I don't know, they sit there and, sit on the porch gaggling 'till three in the morning. I don't know."

HT – "Hmm."

AF – "bunch of geese . . . "

HT – "So that's what you're depressed about?"

AF – "I don't really want to live across the street from a bunch of you-know-whats . . . "

13) During Judge Ferrara's tenure as a judge of the Third Circuit court she continued to hold the beliefs and

attitudes reflected by the statements set forth in paragraphs one through nine (1-9) and eleven and twelve (11 & 12) above. Further, during her circuit court judgeship, Judge Ferrara on diverse occasions made other improper racial and ethnic remarks including, but not limited to, the following:

> (a) In conversations with former acquaintance John Roche, Judge Ferrara routinely referred to African-Americans as "niggers," "nig-nigs," and "roids", and claimed that they are a "sub-species, closely related to the ape family." Judge Ferrara stated to Mr. Roche that her job as a judge would be great if she "didn't have to deal with so many stupid niggers." Judge Ferrara also told Mr. Roche on one occasion "I've got to sentence this nigger. I'd like to lock his black ass up forever, but there are maximum sentencing guidelines I have to follow."
>
> In conversation with Mr. Roche, Judge Ferrara also disparaged other ethnic groups, describing Jewish people as "money-grubbers," "whores," and remarking, "The Bible even says they're a stiff-necked people." Judge Ferrara referred to people of Irish ancestry as "low-life, Shanty-Irish drunken, alcoholic pieces of shit" and claimed that Sicilians had "nigger blood" and were therefore inferior.
>
> (b) In conversations with attorney Sue Radulovich, Judge Ferrara referred to African-Americans as "niggers" and "roids" and referred to them as a "sub-species." Judge Ferrara also disparaged Jewish people as "whores," and complained that they were "always suing doctors." Judge Ferrara referred to Arabs and

> Southern Italians as "niggers" and the Irish people as "low-life drunken alcoholics," "pieces of shit," "inferior people," and people who "feed at the public trough" and "never contributed to society."
>
> (c) On occasions Judge Ferrara referred to African-Americans as "niggers" in the presence of her minor children.

(14) Respondent's conduct, as described in paragraphs eleven through thirteen (11 - 13) above, constitutes:

(a) Misconduct in office as defined by Michigan Constitution 1963, Art. VI, § 30, as amended, and MCR 9.205;

(b) Conduct clearly prejudicial to the administration of justice as defined by the Michigan Constitution 1963, Art. VI, § 30, as amended and MCR 9.205;

(c) Failure to observe high standards of conduct so that the integrity and independence of the judiciary may be preserved, in violation of the Code of Judicial Conduct, Canon 1;

(d) Conduct involving impropriety and the appearance of impropriety, thereby eroding public confidence in the judiciary, in violation of the Code of Judicial Conduct, Canon 2(A);

(e) Failure to respect and observe the law, and to conduct oneself at all times in a manner which would enhance the public's confidence in the integrity and impartiality of the judiciary, as required by the Code of Judicial Conduct, Canon 2(B); and

(f) Conduct violative of relevant positions of MCR 9.104 in that such conduct:

> is prejudicial to the proper administration of justice, contrary to MCR 9.104(1);
>
> exposes the legal profession or courts to obloquy, contempt, censure or reproach, contrary to MCR 9.104(2);
>
> is contrary to justice, ethics, honesty, or good morals, contrary to MCR 9.104(3); and violates the standards or rules of professional responsibility adopted by the Supreme Court, contrary to MCR 9.104(4).

(15) On approximately February 19, 1997, at a televised media conference, Respondent discussed the taped conversations made by her ex-husband, Howard Tarjeft. She announced at the media conference that: "The tapes are a fake. I have listened to the tapes and that is not my voice contained on those tapes."

(16) On March 20, 1997, Respondent filed or caused to be filed a verified complaint in *Ferrara v. Detroit Free Press, Inc.*, Case No. 97-71136, United States District Court for the Eastern District of Michigan, seeking damages for the dissemination of the taped telephone conversations referenced in paragraphs (1) through (14). In her complaint, Respondent acknowledged that on diverse occasions she engaged in telephone conversations with her ex-husband, and claimed that he tape recorded those conversations without her knowledge.

(17) On approximately March 21, 1997, Respondent appeared at a televised media conference with her attorney, Lawrence Stockler, at which he stated, on her behalf,

that he did not care if what Respondent said on the tapes was true or not.

(18) Respondent misrepresented to the public that the taped telephone conversations were "fakes" and that they did not contain her voice. Such conduct was a deliberate attempt by Respondent to mislead the public, and to cover up or conceal misconduct on her part.

(19) Respondent's conduct, as described in paragraphs fifteen through eighteen (15 - 18) above, constitutes:

(a) Misconduct in office as defined by Michigan Constitution 1963, Art. VI, § 30, as amended, and MCR 9.205;

(b) Conduct clearly prejudicial to the administration of justice as defined by the Michigan Constitution 1963, Art. VI, § 30, as amended and MCR 9.205;

(c) Failure to observe high standards of conduct so that the integrity and independence of the judiciary may be preserved, in violation of the Code of Judicial Conduct, Canon 1;

(d) Conduct involving impropriety and the appearance of impropriety, thereby eroding public confidence in the judiciary, in violation of the Code of Judicial Conduct, Canon 2(A);

(e) Failure to respect and observe the law, and to conduct oneself at all times in a manner which would enhance the public's confidence in the integrity and impartiality of the judiciary, as required by the Code of Judicial Conduct, Canon 2(B); and

(f) Conduct violative of relevant portions of MCR 9.104 in that such conduct:

> is prejudicial to the proper administration of justice, contrary to MCR 9.104(1);
>
> exposes the legal profession or courts to obloquy, contempt, censure or reproach, contrary to MCR 9.104(2);
>
> is contrary to justice, ethics, honesty, or good morals, contrary to MCR 9.104(3);
>
> violates the standards or rules of professional responsibility adopted by the Supreme Court, contrary to MCR 9.104(4); and
>
> constitutes misrepresentation of facts or circumstances surrounding a request for investigation or complaint, contrary to MCR 9.104(6).

(20) Respondent's actions have been the subject of widespread criticism in the news media resulting in negative publicity detrimental to the judicial system as a whole. Respondent has generated additional negative publicity through active participation or media conferences, including televised media conferences, whereat Respondent and her counsel made false representations.

(21) Respondent's conduct, as described in paragraph (20), constitutes:

(a) Misconduct in office as defined by Michigan Constitution 1963, Art. VI, § 30, as amended, and MCR 9.205;

(b) Conduct clearly prejudicial to the administration of justice as defined by the Michigan Constitution 1963, Art. VI, § 30, as amended and MCR 9.205;

(c) Failure to observe high standards of conduct so that the integrity and independence of the judiciary may be preserved, in violation of the Code of Judicial Conduct, Canon 1;

(d) Conduct involving impropriety and the appearance of impropriety, thereby eroding public confidence in the judiciary, in violation of the Code of Judicial Conduct, Canon 2(A);

(e) Failure to respect and observe the law, and to conduct oneself at all times in a manner which would enhance the public's confidence in the integrity and impartiality of the judiciary, as required by the Code of Judicial Conduct, Canon 2(B); and

(f) Conduct violative of relevant portions of MCR 9.104 in that such conduct:

> is prejudicial to the proper administration of justice, contrary to MCR 9.104(1);
>
> exposes the legal profession or courts to obloquy, contempt, censure or reproach, contrary to MCR 9.104(2);
>
> is contrary to justice, ethics, honesty, or good morals, contrary to MCR 9.104(3); and
>
> violates the standards or rules of professional responsibility adopted by the Supreme Court, contrary to MCR 9.104(4).

(22) Each of the acts and omissions set forth above constitutes a separate breach by Respondent of her duty to conduct herself at all times, both professionally and personally, in conformity with the standards imposed by the Supreme Court upon members of the bench and upon

members of the bar as conditions for the privilege to practice law and to be a judge in this state.

(23) On April 18, 1997, pursuant to MCR 9.207(C), the Commission provided Respondent with notice of the allegations set forth above and an opportunity to present written matters for consideration by the Commission. Respondent failed and neglected to present any matters for consideration by the Commission regarding said allegations prior to the filing of this Complaint.

Pursuant to MCR 9.209, Respondent is advised that an original verified Answer to the foregoing First Amended Complaint, and nine copies thereof, must be filed with the Commission within 14 days after service upon Respondent of the First Amended Complaint. Such Answer shall be in a form similar to the answer in a civil action in a circuit court and shall contain a full and fair disclosure of all the facts and circumstances pertaining to Respondent's alleged misconduct. The willful concealment, misrepresentation, or failure to file such answer and disclosure shall be additional grounds for disciplinary action under the Complaint.

THE MICHIGAN JUDICIAL
TENURE COMMISSION

BY: /s/ Allan D. Sobel
Allan D. Sobel (P 40872)
Executive Director &
General Counsel
211 West Fort Street,
Suite 1410
Detroit, Michigan 48226

DATED: August 1, 1997

STATE OF MICHIGAN
BEFORE THE JUDICIAL TENURE COMMISSION

IN THE MATTER OF: HON. ANDREA J. FERRARA Judge, Third Circuit Court Detroit, Michigan	FORMAL COMPLAINT NO. 52

STATE OF MICHIGAN)
) SS
COUNTY OF WAYNE)

PROOF OF SERVICE

Camella A. Thompson, being first duly sworn, deposes and says that she is a person of suitable age and discretion to serve process, and that on the 1st day of August, 1997, pursuant to MCR 9.223(A)(2), she served the following:

EXAMINER'S MOTION FOR LEAVE TO AMEND FORMAL COMPLAINT NO. 52 AND BRIEF IN SUPPORT

to Respondent's counsel as follows: **by hand delivery to:**

Mark R. Bendure
577 East Larned, Suite 210
Detroit, Michigan 48226-4392

and by facsimile transmission to: Constance E. Cumbey, Esq. at (810) 253-9037

/s/ Camella A. Thompson
CAMELLA A. THOMPSON,
(DEPONENT)

Subscribed and Sworn to before me
this 1st day of August, 1997

/s/ Wilmar S. Bennett
Wilmar S. Bennett, Notary Public
Wayne County
My Commission Expires: July 15, 1998

STATE OF MICHIGAN
BEFORE THE JUDICIAL TENURE COMMISSION

IN THE MATTER OF:

HON. ANDREA J. FERRARA Judge, Third Circuit Court Detroit, Michigan	FORMAL COMPLAINT NO. 52

STATE OF MICHIGAN)
) SS
COUNTY OF WAYNE)

PROOF OF SERVICE

Camella A. Thompson, being first duly sworn, deposes and says that she is a person of suitable age and discretion to serve process, and that on the 1st day of August, 1997, pursuant to MCR 9.223(A)(2), she served the following:

EXAMINER'S MOTION FOR LEAVE TO AMEND FORMAL COMPLAINT NO. 52 AND BRIEF IN SUPPORT

upon Respondent's counsel by the U.S. Postal Service addressed to:

Mark R. Bendure
577 East Larned,
Suite 210
Detroit, Michigan
48226-4392

Constance E. Cumby, Esq.
2525 Telegraph Road, Suite 306
Bloomfield Hills, MI 48302-0289

and by facsimile transmission to:

Mark R. Bendure, Esq. at:
(313) 961-1553 and
Constance E. Cumbey, Esq. at
(810) 253-9037

/s/ Camella A. Thompson
CAMELLA A. THOMPSON,
(DEPONENT)

Subscribed and Sworn to before me
this 1st day of August, 1997

/s/ Wilmar S. Bennett
Wilmar S. Bennett, Notary Public
Wayne County
My Commission Expires: July 15, 1998

STATE OF MICHIGAN
BEFORE THE JUDICIAL TENURE COMMISSION

IN THE MATTER OF:

HON. ANDREA J. FERRARA Judge, Third Circuit Court Detroit, Michigan	FORMAL COMPLAINT NO. 52

BRIEF IN SUPPORT OF EXAMINER'S MOTION FOR LEAVE TO AMEND FORMAL COMPLAINT NO. 52

The policy in favor of granting leave to amend pleadings is evident both in the Court Rules pertaining to disciplinary actions and those pertaining to civil actions. MCR 9.214 provides:

> "The Master, before the conclusion of the hearing, or the Commission, before its determination, may allow or require amendments to the complaint or answer. The complaint may be amended to conform to the proofs or to set for the additional facts, whether occurring before or after the commencement of the hearing. If an amendment is made, the respondent must be given reasonable time to answer the amendment and to prepare and present his or her defense against the matters charged in the amendment."

The above rule contemplates the likelihood that additional information and allegations may surface and should be incorporated into the original Formal Complaint so that those matters would be adjudicated with other allegations against the Respondent. MCR 9.211 requires the hearing to conform as nearly as possible to the rules of procedure and evidence governing civil actions. Thus, under MCR 2.118(A)(2), leave to amend should be freely given when justice so requires. See, generally, *Fyke & Sons v. Gunter Company*, 390 Mich 649 (1973).

In previous Formal Complaints, leave to amend has been routinely granted, before and during the hearing, and at the close of proofs. See, for example, Formal Complaint No. 41, *In re Leon Jenkins*, 437 Mich 1 (1991); Formal Complaint No. 31, *In re Loyd*, 424 Mich 517, 519 (1986); Formal Complaint No. 24, *In the Matter of Lawrence*, 417 Mich 248 (1983); Formal Complaint No. 18, *In the Matter of Del Rio*, 400 Mich 665 (1977); and Formal Complaint No. 16, *In the Matter of Bennett*, 403 Mich 178 (1978).

In *Jenkins*, the Master permitted amendment of the original complaint to include additional charges. The Michigan Supreme Court in *Lloyd* upheld the Master's decision to grant the Examiner's motion at the close of proofs to amend the complaint to include additional charges. In *Lawrence*, the Formal Complaint was filed and served on February 5, 1981 and a supplemental complaint was filed on May 5, 1981. In *Del Rio*, the Master issued an order allowing an amendment of the Formal Complaint after the commencement of the hearing. Also, during the hearing in *Bennett*, two charges were amended and an additional charge was added.

The policy of liberal amendment to formal complaints espoused in MCR 9.214 is also followed in other jurisdictions. See *In re Laughlin*, 265 SW2d 805, 807 (Tex. 1954); *Matter of Briggs*, 595 SW2d 270, 278 (Mo. 1980). In

Matter of Carrillo, 542 SW2d 105, 108 (Tex. 1976), the Texas Supreme Court provided a helpful analysis of the amendment provision:

> Our Rule 3(b) provides for the Commission to give a notice of preliminary investigation before finally determining that formal proceedings shall be instituted. The purpose is to give the judge an opportunity to reply to the charges then before the Commission before its acts with respect to formal proceedings. Judge Carrillo filed his reply on May 13, 1975. This did not mean that the Commission was prevented from preferring additional charges in its subsequent Notice of Formal hearings and its First Amended Notice of Formal Hearings, or that it should start all over by incorporating all charges in a new Notice of Preliminary Investigation. It is clear from our Rule 4 that it was the Notice of Formal Proceedings which officially and formally commenced this proceeding. Nothing in our Rules nor the concept of due process requires that the pleadings instituting formal proceedings, or amendments thereto, need be limited to matters contained in the verified statement initially incorporated by the Commission in its Notice of Preliminary Investigation, so long as due notice is given concerning the additional charges. Rule 11 specifically provides that a Master, or the Commission, at any time prior to reaching a decision, 'may allow or require amendments to the notice of formal proceedings . . . ' Rule 11 continues: 'The notice may be amended to conform to proof or to set for the additional facts, whether occurring before or after the commencement of the hearing.' Judge Carrillo was given every notice

> required by the Rules. He had ample opportunity to reply and did reply to the sum total of the twelve charges that were made against him in the First Amended Notice of Formal Hearing filed with the Master on October 8, 1975.

In the instant case allowing the requested amendments will in no way prejudice Respondent, as the conduct alleged is within her knowledge. Also, the charges are similar in nature and related to charges already contained in the formal complaint regarding Respondent's repeated use of racial and ethnic slurs.

The Master is urged to grant the Examiner's Motion For Leave To Amend Formal Complaint No. 52.

JUDICIAL TENURE
COMMISSION
STATE OF MICHIGAN

BY: /s/ Allan D. Sobel
ALLAN D. SOBEL
(P40872)
Examiner

ANNA MARIE NOESKE
(P34091)
Co-Examiner
211 West Fort Street,
Suite 1410
Detroit, Michigan 48226
(313) 256-9104

DATED: AUGUST 1, 1997

STATE OF MICHIGAN

BEFORE THE MICHIGAN JUDICIAL TENURE COMMISSION

COMPLAINT AGAINST:

HON. ANDREA J. FERRARA Judge, Third Circuit Court Detroit, Michigan 48226 _______________________/	FORMAL COMPLAINT NO. 52 HON. MASTER VESTA SVENSON

SECOND AMENDED COMPLAINT

The Judicial Tenure Commission of the State of Michigan ("Commission") files this Second Amended Complaint against Andrea J. Ferrara ("Respondent"), Third Circuit Court Judge in the City of Detroit, Wayne County, Michigan. The Commission charges acts of judicial misconduct constituting violations of the standards of judicial conduct under MCR 9.205. This action is taken pursuant to the authority of the Commission under Article VI, Section 30 of the Michigan Constitution of 1963, as amended, and MCR 9.200 *et seq*.

Respondent is currently a judge of the Third Circuit Court in the City of Detroit, Wayne County, Michigan, and has been since January 1, 1993. The acts of judicial misconduct are set forth in the following paragraphs:

(1) The Michigan Judicial Tenure Commission adopts and incorporates by reference herein, each and every allegation in the First Amended Complaint.

(2) From January 1, 1981 to January 1, 1993, Judge Ferrara was a judicial officer in that she was either a

district court judge at the 33rd District Court, or a visiting judge receiving assignments.

(3) Respondent requested that Christopher Tarjeft impair or destroy evidence consisting of tape recordings.

(4) Respondent refused to testify on October 3, 1997, in response to a question of the Examiner without justification and after being ordered to testify by the Master.

(5) Respondent's conduct as set forth in paragraph (4), above, was contemptuous.

(6) Respondent's conduct as set forth in paragraphs (2) through (5), above, constitutes:

> (a) Misconduct in office as defined by the Michigan Constitution 1963, Art. VI, § 30, as amended, and MCR 9.205;
>
> (b) Conduct clearly prejudicial to the administration of justice as defined by the Michigan Constitution 1963, Art. VI, § 30, as amended, and MCR 9.205;
>
> (c) Failure to observe high standards of conduct so that the integrity and independence of the judiciary may be preserved, in violation of the Code of Judicial Conduct, Canon 1;
>
> (d) Conduct involving impropriety and the appearance of impropriety, thereby eroding public confidence in the judiciary, in violation of the Code of Judicial Conduct, Canon 2(A);
>
> (e) Failure to respect and observe the law, and to conduct oneself at all times in a manner which would enhance the public's confidence in the integrity and impartiality of the judiciary, as

required by the Code of Judicial Conduct, Canon 2(B);

(f) Obstruction of justice as to the allegations in paragraphs (3) and (4) only; and

(g) Conduct in violation of relevant portions of MCR 9.104 in that such conduct:

> is prejudicial to the proper administration of justice, contrary to MCR 9.104(1);
>
> exposes the legal profession or courts to obloquy, contempt, censure or reproach, contrary to MCR 9.104(2);
>
> is contrary to justice, ethics, honesty, or good morals, contrary to MCR 9.104(3); and
>
> violates the standards or rules of professional responsibility adopted by the Supreme Court, contrary to MCR 9.104(4).

Pursuant to MCR 9.209, Respondent is advised that an original verified Answer to the foregoing Second Amended Complaint, and nine copies thereof, must be filed with the Commission within 7 days after service upon Respondent of the Second Amended Complaint. Such Answer shall be in a form similar to the answer in a civil action in a circuit court and shall contain a full and fair disclosure of all the facts and circumstances pertaining to Respondent's alleged misconduct. The willful concealment, misrepresentation, or failure to file such answer and disclosure shall be additional grounds for disciplinary action under the Complaint.

THE MICHIGAN JUDICIAL
TENURE COMMISSION

BY: /s/ Allan D. Sobel
Allan D. Sobel (P 40872)
Executive Director & General
Counsel
211 West Fort Street,
Suite 1410
Detroit, Michigan 48226

DATED: October 10, 1997

STATE OF MICHIGAN

BEFORE THE MICHIGAN JUDICIAL
TENURE COMMISSION

COMPLAINT AGAINST:	
HON. ANDREA J. FERRARA Judge, 3rd Circuit Court Detroit, Michigan 48226 ____________________/	FORMAL COMPLAINT NO. 52 MASTER: HON. VESTA SVENSON

THIRD AMENDED COMPLAINT

The Michigan Judicial Tenure Commission ("Commission") files this Third Amended Complaint against Andrea J. Ferrara ("Respondent"), Third Circuit Court Judge in the City of Detroit, Wayne County, Michigan. The Commission charges misconduct constituting a violation of the standards of judicial conduct under MCR 9.205 of the Michigan Court Rules of 1985. This action is taken pursuant to the authority of the Commission under Article VI, §30 of the Michigan Constitution of 1963, as amended, and MCR 9.200 *et. seq.* of the Michigan Court Rules of 1985. The filing of this Complaint has been authorized and directed by resolution of the Commission and its amendment has been allowed by the Master, pursuant to MCR 9.214.

Respondent is currently a judge of the Third Circuit Court in the City of Detroit, Wayne County, Michigan, and has been since January 1, 1993. The acts of judicial misconduct are set forth in the following paragraphs:

(1) The Commission adopts and incorporates by reference herein each and every allegation contained in both

the First Amended Complaint and the Second Amended Complaint.

(2) On October 27, 1997, Respondent called a witness, Avela Smith, an African American woman, who testified upon direct examination by Respondent's attorney, Mark Bendure, that she had attempted to contact the media to give them "her story," consisting of an incident where Respondent gave Ms. Smith, a stranger, a ride home from a Democratic rally on Belle Isle in August, 1994.

(3) When the Commission's examiner, Allan Sobel, attempted to object on the basis of relevance, Mr. Bendure argued that the Commission "presented a lot of newspaper articles which purports to reflect upon this situation" and that he intended to show that "if there is an adverse reaction it is in large part due to the distorted nature of the media presentation rather than the acts that Judge Ferrara is convicted of." He further argued that the testimony was relevant because of allegations that Judge Ferrara was responsible for "some adverse impact on the administration of justice because people who read these articles have a certain attitude." (TR 6) The Master permitted Mr. Bendure to continue with his line of questioning.

(4) After further testimony, Mr. Bendure asked Ms. Smith, "Did you feel strongly enough about this situation to write to the media? To write to any newspapers?" (TR 9) Mr. Sobel again objected on the basis of relevance. Mr. Bendure argued that newspaper articles had been offered by the Examiner and admitted into evidence, and he

wanted *"to get into the other side of the story,"* and continued:

> "Well, they have again introduced their evidence of letters including that of Ms. Roberts and other people purporting to be critical of Judge Ferrara, and *I think it goes to the issue of whether or not, first of all, what the public reaction is and, secondly, whether it is a fair-minded public reaction based on the facts or whether it is one based upon a less than candid account by the media."* (TR 10)

(5) The Master allowed the witness to answer as to whether she had written the print media, and in connection therewith Mr. Bendure offered proposed Exhibit H, which consisted of an undated, hand-written letter which Ms. Smith claimed that she had someone write out for her because her "handwriting is not too legible" and which she had signed. Ms. Smith testified that there were "plans" for publication of the letter. (TR 11)

(6) Mr. Sobel voir dired Ms. Smith who revealed that she did not understand some of the language used in the letter, such as the word "subterfuge," and after much prodding also reluctantly admitted that the letter had actually been written by the Respondent, Judge Andrea Ferrara, who had picked up Ms. Smith at her residence, taken her to a McDonalds and written the letter "about two weeks ago," which was after the commencement of the hearing in this matter. (TR 11-12)

(7) Respondent's conduct as set forth in paragraphs (2) through (6), above, constitutes:

(a) Misconduct in office as defined by the Michigan Constitution 1963, Article VI §30, as amended, and MCR 9.205;

(b) Conduct clearly prejudicial to the administration of justice as defined by the Michigan Constitution 1963, Article VI §30, as amended and MCR 9.205;

(c) Failure to observe high standards of conduct so that the integrity and independence of the judiciary may be preserved, in violation of the Code of Judicial Conduct, Canon 1;

(d) Conduct involving impropriety and the appearance of impropriety, thereby eroding public confidence in the judiciary, in violation of the Code of Judicial Conduct, Canon 2(A);

(e) Failure to respect and observe the law, and to conduct oneself at all times in a manner which would enhance the public's confidence in the integrity and impartiality of the judiciary, as required by the Code of Judicial Conduct, Canon 2(B);

Fabrication of evidence;

Obstruction of justice;

Dishonesty and fraud in that the letter and Ms. Smith's testimony were intended by Respondent to give the false impression that Ms. Smith authored the letter spontaneously; the false impression that it had been written prior to the start of the hearing and in response to media reports of Respondent's racist comments, and considerable negative publicity and public reaction; and the false impression that said letter had been received by media representatives prior to the commencement of the hearing, but unlike the adverse remarks was not published. (See *Matter of Binkowski,* 420 Mich 97 [1984], *Matter of Jenkins,* 437 Mich 15 [1991]);

(i) Lack of candor in a disciplinary matter in violation of Rule 8.1(a) or (b) of the Rules of Professional Conduct; and

(j) Conduct in violation of relevant portions of MCR 9.104 in that such conduct:

is prejudicial to the proper administration of justice, contrary to MCR 9.104(1);

exposes the legal profession or courts to obloquy, contempt, ensure or reproach, contrary to MCR 9.104(2);

is contrary to justice, ethics, honesty, or good morals, contrary to MCR 9.104(3); and

violates the standards or rules of professional responsibility adopted by the Supreme Court, contrary to MCR 9.104(4).

Pursuant to MCR 9.209, Respondent is advised that an original answer to the foregoing Third Amended Complaint, and nine copies of, must be filed with the Commission by November 4, 1997, or such date as extended by the Master. Such answer shall be in a form similar to the answer in a civil action in a Circuit Court and shall contain a full and fair disclosure of all of the facts and circumstances pertaining to Respondent's alleged misconduct. The willful concealment, misrepresentation, or failure to file such answer and disclosure shall be additional grounds for disciplinary action under the Complaint.

THE MICHIGAN JUDICIAL
TENURE COMMISSION

BY: /s/ Allan D. Sobel/by Anna
Allan D. Sobel, Examiner
(P 40872)
Executive Director/General
Counsel
211 West Fort Street,
Suite 1410
Detroit, Michigan 48226

DATED: October 29, 1997

Avela Smith Letter

Judge Ferrara Is No Racist

It is said that actions speak louder than words. Avelia Smith, a Detroit resident says she's fed up with the one-sided bias reporting of Judge Ferrara by the Detroit Free Press. "Judge Ferrara is no racist" says Avelia Smith. "I know her to be a decent and kind person." Ms. Smith reports that in August 1994 she attended a political rally at Belle Isle and was stranded with no way home. She had asked several people for help and was turned down. Ready to give up all hope, she approached a woman who she did not know. The woman readily agreed to give her a ride and drove her home to Van Dyke & Mack area. This good deed was not forgotten. In March 1997, Avelia was watching the evening news and immediately recognized the woman who extended an act of kindness to her 3 years ago. It was Judge Andrea J. Ferrara.

Avelia Smith tried to reach Judge Ferrara at her office to lend support. However Judge Ferrara could not be reached due to a medical leave. Ms. Smith did not give up. She kept calling and finally was able to make contact with Judge Ferrara.

Ms. Smith wants the Detroit community to know the kinder, gentler side of Judge Ferrara. "Giving a black woman stranger a ride home from Belle Isle does not reflect racism," says Smith.

It is important to note that despite repeated attempts to contact the Detroit Free Press no one has bothered to return my calls. Apparently they only want to print what supports their agenda.

Many of my friends in the Detroit community believe this is a subterfuge to divert attention away from the real racism which is the abolition of Detroit Recorders Court by the Engler Administration.

/s/ Avela Smith
#313 52113/5

11413 Kenmoor
Det Mich 48205

Testimony of Avela Smith
10/27/97

* * *

[p. 3] AVELA SMITH,

Called by the Respondent at about 9:03 a.m., and sworn by the Court, testified:

DIRECT EXAMINATION

BY MR. BENDURE:

Q Would you state your name for the record, ma'am?

A Avela Smith.

Q And have we met before today?

A No, sir.

Q For the record, you are an African-American woman?

A Yes.

Q Have you ever met Judge Ferrara before?

A Yes, sir.

Q And can you tell me when it was that you met her?

A It was about August of 1994 during a radical Democratic [p. 4] Convention at Belle Isle.

Q You were in attendance there?

A Yes, sir.

Q Was she?

A Yes, sir.

Q And where did you reside? Where did you live at that time?

A On Beals Street in the Mack and Van Dyke area.

Q Is that in the City of Detroit?

A Yes, sir.

Q How had you arrived at that rally?

A Well, someone had dropped me off there.

Q Did you have a ride home?

A No, sir.

Q Did the time come when you asked people to give you a ride home?

A Yes, sir, I had asked several people.

Q Can you tell us about how many?

A Seven or eight, somewhere around there. Most of them were black.

Q Did they give you the ride home?

A No, sir.

Q Did you meet Judge Ferrara at that time?

A Yes.

Q Can you tell us in your own words what happened?

A I had asked her for a ride home. She said sure. And then [p. 5] the man who was with her, which was Negro, he had said, no, don't take her home, but she said that she would anyway. And at that time I didn't know that she was a judge.

Q Did she boast about that or anything like that?

A No, sir.

Q Did she have any reservation about taking you home?

A Well, no, she took me home.

Q And did you hear from her after that? Did you maintain contact?

A Well, no, sir.

Q How was it that you came to our attention as a witness in this case?

A Well, I had saw her on the news and they were saying that she was a racist, and I said, oh, no, that is not Judge Ferrara who had took me home. She is not like that at all.

Q Were you able to reach an opinion whether or not the acts that she showed you were the acts of a racist?

A No, sir, it was not the acts of a racist. She was very kind to me.

Q Did the time come when you attempted to contact the media to give them your story?

A Yes, sir. Right after I heard it on the news, you know, I tried to get in touch with her and the news, and I had called Information trying to, you know, to see what courtroom she was from and her number so I could tell them that she is not [p. 6] like that at all.

Q Did you contact the Detroit Free Press at all?

A Well, I contacted and I talked to –

MR. SOBEL: Objection, your Honor; relevance.

THE COURT: What is the relevance?

MR. BENDURE: They have presented a lot of newspaper articles which purport to reflect upon this situation and it is being alleged that Judge Ferrara is responsible for the reaction to those articles. We purport to show that if there is an adverse reaction it is in large part due to the distorted nature of the media presentation rather than the acts that Judge Ferrara is convicted of.

THE COURT: I understand that, but what relevance does that have to this hearing?

MR. BENDURE: Well, I understood that one of the allegations was that Judge Ferrara was responsible for some adverse impact on the administration of justice because people who read these articles had a certain attitude.

THE COURT: All right, overruled.

MR. BENDURE: Thank you.

Q (By Mr. Bendure, continuing): Did you attempt to contact the Detroit Free Press?

A Yes, I talked with Orlando Williams and she said that she would call me back, but she never did. I talked with her several times.

[p. 7] MR. SOBEL: Your Honor, excuse me. I would move to strike the answer as non-responsive. Ms. Williams does not work for the Detroit Free Press and I can establish that unless Mr. Bendure will stipulate to it.

MR. BENDURE: My understanding is that she is a Detroit News reporter. I will try and clarify that.

THE COURT: I will strike the answer, and I will certainly strike the hearsay.

MR. BENDURE: Okay.

Q (By Mr. Bendure, continuing): Did you attempt to contact any of the Detroit newspapers?

A Did I attempt to contact anyone from there? I talked with Orlando Williams.

Q Okay, did you leave a message about what you wanted to talk about?

A Yes, sir. I talked with her for a minute and told her briefly that Andrea, Judge Ferrara, was not prejudiced and that I was a Negro woman and she is not like that. She said that she would call me back but she never did, and which I called her several times and she would always say I will call you back, but she never did.

Q Did you ever read what you had told her about Judge Ferrara not being a racist appearing in the paper?

A No, sir.

THE COURT: By the way, Mr. Bendure, would you [p. 8] stipulate, just to hasten things along, that the person identified by Ms. Smith is a News reporter?

MR. BENDURE: It is my understanding that she is employed by the Detroit News as a reporter.

THE COURT: All right, thank you.

Q (By Mr. Bendure, continuing): Have you ever heard the term niggertown used?

A Yes,,sir.

Q Can you describe for us the occasions on which you have heard it used?

A Well, it was a white friend of mine. We were really good friends. She used to drive a church bus and I would, you know, ride on there, and she would come pick me up and others in an area that was about 99 percent, you know, Negro. And she said I don't want to pick up in this "n"-word area and we started laughing. I didn't take that as, you know, no racial slur because I understood what she, you know, was saying.

Q Are there parts of the City of Detroit that you tend to avoid?

A Yes, sir.

Q And why is that?

A Because there is some bad areas. The area I was staying in. Like Mack and 12th, I heard of those streets when I was nine years old. You know, that is a mostly all Negro area but I had to live over there, so I just –

[p. 9] Q Would they be areas that you would want young children to be traveling in?

A No, sir.

Q Besides contacting the media by phone calls as you have described, did you feel strongly enough about this to take any other action?

A Well, I would just tell other people, my relatives and friends, that I had met her at Belle Isle and she had, you know, did me a great favor by taking me home, and that she wasn't like that at all, and that I had to help her in her time of distress because she helped me.

Q And people that got the other side of the story so to speak, did they reflect to you that they thought that this was a horrible act that brought down or reflected badly on the administration of justice and any other judges.

A I don't understand the question.

Q Okay, when you spoke to people giving them what you knew about Judge Ferrara based on your experience, was their reaction favorable to her or unfavorable to her?

A Well, they was favorable towards her.

Q Did you feel strongly enough about this situation to write to the media? To write to any newspapers?

MR. SOBEL: Objection, your Honor.

A Yes.

MR. SOBEL: Excuse me. Objection; relevance.

[p. 10] MR. BENDURE: We have had newspaper articles admitted over our objection by the examiner and I want to get into the other side of the story.

MR. SOBEL: If I may for the record, your Honor, the fact that there is somebody out in the community who either attempts to write an article that is favorable to Judge Ferrara or does write one is, as far as I am concerned, immaterial and irrelevant. I am sure that there are many people who felt like writing unfavorable articles, and those who didn't or those who may have, but that their words did not appear in the print media doesn't have any particular relevance, I don't believe.

MR. BENDURE: Well, they have again introduce their evidence of letters including that of Ms. Roberts and other people purporting to be critical of Judge Ferrara, and I think it goes to the issue of whether or not, first of all, what the public reaction is and, secondly, whether it is a fair minded public reaction based on the facts or whether it is one based upon a less than candid account by the media.

THE COURT: I will allow her to answer the question as to whether she wrote the paper, but that will be the last question along this line that I will allow. The objection is overruled.

(Letter marked Defendant's Proposed Exhibit H)

THE COURT: What is the number of the exhibit?

[p. 11] MR. BENDURE: "H," your Honor.

Q (By Mr. Bendure, continuing): Let me show you what has been marked as Exhibit H and ask if that is a letter which you wrote to a newspaper?

A Yes, I had someone write it out for me because my handwriting is not too legible, and I signed it.

Q The person who wrote that out, did they do so at your request?

A Well, yes, I requested it.

Q And to what newspaper was that addressed?

A To the Chronicle.

Q Do you know whether it was published or whether there are plans for publication?

A Well, I talked with Sam Logan and he said there are plans for publication.

MR. BENDURE: I would move the admission of Exhibit H, your Honor.

MR. SOBEL: May I voir dire the witness, your Honor?

THE COURT: Yes, you may.

VOIR DIRE

BY MR. SOBEL:

Q What does the word "subterfuge" mean?

A "Subterfuge?

Q Yes.

A I don't know.

[p. 12] Q You don't know?

A No. Would you tell me what it means?

Q Not at this time.

Who wrote this letter?

A Well, someone wrote it. A friend.

Q Who is the someone?

A A friend.

Q Who is the friend?

A I had rather not say.

Q Well, you are under oath and you are obligated to say. So would you please tell the Court who it is that wrote this letter that has been marked as Exhibit H.

THE COURT: You have to answer, Ms. Smith.

Q (By Mr. Sobel, continuing): Who wrote the letter, ma'am?

THE WITNESS: I have to answer that?

THE COURT: Yes.

A Well, I had Judge Ferrara write that for me.

Q (By Mr. Sobel, continuing): And when did Judge Ferrara write it?

A About two weeks ago.

MR. SOBEL: I object to the admission of Proposed Exhibit H on the basis that it was a fabrication being perpetrated on the Court. It is a fraud on the Court to suggest that this was a letter that this lady was sending to the media in the Detroit metropolitan area at the same time [p. 13] that the various exhibits that we have introduced were in fact being either printed by the print media or played on television in the Detroit metropolitan area.

THE COURT: Mr. Bendure?

MR. BENDURE: It seems to me that the timing of the letter is irrelevant. We haven't established any rule that says that we are only dealing with letters written on a particular date. The witness has testified, and I will clarify this up, that this is the substance of which she wanted said. It is a letter which is every bit as valid as the letters that the Prosecution is seeking to introduce.

THE COURT: I am not going to allow it in. Denied.

* * *

[p. 14] Q You heard Mr. Sobel talk about this being a fabrication. Are the contents of those letters what you asked Judge Ferrara to write or are they something that she made up?

A No, she didn't make those up. I wanted her to write those because I – You know, I don't know all those high-classed words or anything or how to put it together too well. So I had her write that. She didn't ask me to write anything. I voluntarily told her that I, you know, wanted to write her – My handwriting is not too good and which it never was. My penmanship is not good and I don't know how to spell a lot of words. So I had her write it. I could write another one in my own writing and try to write it just as legible and understandable as I could.

Q Is there anything false about the contents?

A No, there is not.

* * *

[p. 24] Q (by Mr. Sobel, continuing): Where were you when Judge Ferrara wrote that letter out?

A Where were we?

Q Yes.

A We were at McDonald's.

Q Which McDonald's?

A I don't quite – Somewhere on Gratiot.

Q How did you get there?

A Well, she drove me there which was another bad Negro area.

Q Did she pick you up?

A Yes, sir.

Q Did she buy you lunch?

A Well, no, sir.

Q Are you employed?

A No, I am on disability.

* * *

[p. 25] Q Have you heard that word used as a class reference; that is, to somebody who would be of African-American descent as lower class? Is there a class connotation that you have heard?

A I beg your pardon?

Q Have you heard that word used with a class conation; that is, as sort of a low-classed person as opposed to a high-classed person?

A Do you mean as a low-classed Negro –

Q Yes.

A – by another Negro?

Q Yes.

[p. 26] A Oh, umpteen times. All the time.

* * *

[p. 26] BY MR. BENDURE:

Q Can we have your name again for the record?

A Avela Smith.

Q You have testified previously in this matter. do you recall that?

A Yes, sir.

Q Following that – We had talked previously about an exhibit, Exhibit H-1 which had been excluded at that time.

THE COURT: I think it is H-2.

MR. BENDURE: I'm sorry.

Can we have the original of that?

Q (By Mr. Bendure, continuing): Let me show you what has been marked as H-2 which has since been admitted into evidence. Do you recall being asked about that document?

A Yes, sir.

Q Now, let me direct your attention to excerpt Page 11 and ask [p. 27] if you recall this testimony: Question, Mr. Bendure, by me:

> "Q Let me show you what has been marked as Exhibit H and ask if that is a letter which you wrote to a newspaper?
>
> "A Yes, I had someone write it out for me because my handwriting is not too legible,

and I signed it." Do you remember that testimony?

A Yes, sir.

Q Were you trying to hide the fact that someone else had written it out for you when you gave that answer?

A No, I wasn't trying to hide, no, sir.

Q Did you think that when you answered the question by having someone write it out for you because of your handwriting that that was somehow concealing the fact that someone else wrote it?

A I don't quite understand the question.

Q Ma'am, from the testimony would you agree with me that with my question and your answer, Page 11 of the excerpt, we brought out the fact that someone else had written it for you?

A Yes, sir.

Q Now let me ask you a little bit now about that letter. Did Judge Ferrara ask you to write a letter or did you ask her to write a letter?

A I asked her to write a letter.

Q And did you tell her the things that you wanted that letter [p. 28] to say or did she tell you?

A I told her.

Q Now, I think you indicated that was written out at a McDonald's?

A Yes, sir.

Q Was there anyone else present with you and Judge Ferrara when that was done?

A Yes, sir.

Q Who was that?

A Joe.

Q Joe Benert, do you know?

A Yes.

Q Did you have anything to eat there?

A No, I didn't eat because that was a Friday, and usually on Friday and Tuesday that is a fast day of mine until after 3:00 o'clock, and that was before 3:00.

Q Okay, so was there any hospitality or inhospitality by Judge Ferrara by not giving you anything to eat?

A No, sir.

Q Now, as this was written down, you saw that it was in different printing than your own; correct?

A Yes.

Q If I can address your attention to the bottom, is that your handwritten signature?

A Yes, sir.

[p. 29] Q Is it obvious to you that the signature is different than the lettering?

A Yes.

Q And if you look at the content of the letter, do you see any indication that it was purported to be your handwriting?

A I don't understand.

Q I will withdraw the question.

Did you include your telephone number in that letter?

A Yes, sir.

Q Is that some sort of act of concealment or something you give the people your own number?

A No.

Q How about your address? You gave your address there too?

A Yes, sir.

Q And that is in your handwriting?

A Yes.

Q Is there any kind of concealment about giving your actual signature, your telephone number, and your address?

A No, sir.

Q Now let's get into the content of this now. This letter reports that you are fed up with the one-sided biased reporting of Judge Ferrara by the Detroit Free press. Is that in fact your sentiment?

A Yes.

Q Did you tell her that.

[p. 30] A Yes.

Q And then there is a quotation, "Judge Ferrara is no racist, close quote, says Avela Smith. Do you see that?

A Yes, sir.

Q Is that in fact something you said?

A Yes.

Q How about the quotation, "I know her to be a decent and kind person, close quote. Do you see that?

A Yes.

Q Was that in fact something you said?

THE COURT: I think that she said that the entire letter is her sentiment. Why don't you – Well, I am not going to interrupt you. Go on.

MR. BENDURE: Thank you.

Q (By Mr. Bendure, continuing): Was that in fact something you said?

A Yes, sir.

Q Was that part of what you asked Judge Ferrara to include in the letter?

A Yes.

Q Now you mentioned the Belle Isle political rally. Was that something you talked about with Judge Ferrara in this letter?

A Yes, because that was where I had met her at.

Q Now, there is also a statement in there that Ms. Smith wants the Detroit community to know the kinder, gentler side of [p. 31] Judge Ferrara. Is that your sentiment?

A Yes, sir.

Q How about the statement, "Giving a black woman stranger a ride home from Belle Isle does not reflect racism"; was that your sentiment?

A Yes, sir.

Q Now do you see the final paragraph? Let's see if I am reading it right: "Many of my friends in the Detroit community believe this is a subterfuge to divert attention away from the real racism which is the abolition of Detroit Recorder's Court by the Engler Administration. Do you see that?

A Yes, sir.

Q And I think you indicated that the word "subterfuge was used by Judge Ferrara. You weren't familiar with that term?

A Well, she explained it to me, yes.

Q Did you describe to her the concern that the real racism was the abolition of Detroit's Recorder's Court?

A By the Engler Administration, yes, sir.

Q Is that something you and her had talked about?

A Well, I had known that before I talked to her.

Q Did you read – I think you said you read this letter before you signed it?

A Yes, sir.

Q And did you understand by that last paragraph without regard [p. 32] to knowing the specific meaning of subterfuge, was it your understanding that friends in the Detroit community thought that this was a diversion and that the real racism wasn't Judge Ferrara but the abolition of Detroit Recorder's Court?

A Yes, sir.

Q Was that something you wanted her to include in this letter?

A Yes, sir, it was.

Q Now I think you indicated that one of the reasons you asked her to draft the letter for you was because you didn't have very good handwriting yourself?

A Yes, I know I don't have good handwriting.

MR. BENDURE: Perhaps we have this marked.

(Handwriting Exemplar of Avela Smith marked Defendant's Proposed Exhibit L)

THE COURT: Is that a sample of Ms. Smith's handwriting?

MR. BENDURE: Yes, your Honor.

Q (By Mr. Bendure, continuing): Let me show you what has been marked as Exhibit L. Review this, if you could, and let me know if you have the original of that document.

A Yes, I have the original but this is not it.

THE COURT: Have you showed that to Mr. Sobel?

MR. BENDURE: Yes, I have, your Honor.

THE COURT: Do you have any objections to it, Mr. Sobel?

MR. SOBEL: If it is only being offered – First of all, if the witness testifies that it is her writing and it [p. 33] is only being offered to show her writing style and for no other purpose, then I have no objection.

THE COURT: Is that what it is being offered for, Mr. Bendure?

MR. BENDURE: Yes, your Honor.

THE COURT: It is admitted.

* * *

THE COURT: Sure.

Q (By Mr. Bendure, continuing): Is this a letter which you wrote to Judge Ferrara without being prompted?

A I don't understand "prompted."

Q Okay, did you send this of your idea or did someone ask you to send this letter?

A No, it was my own idea and my own free will.

THE COURT: Did you write it out in your own handwriting?

THE WITNESS: Yes, ma'am.

THE COURT: All right, it is admitted.

* * *

Trial Proceedings – 11/5/97
Testimony of Robert Maul

* * *

DIRECT EXAMINATION

[p. 102] BY MR. BENDURE:

Q Please state your name for the record, sir?

A Robert C. Maul.

Q And how are you employed?

THE COURT: Before you proceed, Mr. Maul. The microphones that exist in the courtroom do not amplify your [p. 103] voice, No. 1; and No. 2, you don't have to bend over because I think they are set up – Actually, we are not even using them.

Q (By Mr. Bendure, continuing): I'm sorry, sir; could you tell us how you are employed?

A I am self-employed in a variety of areas.

Q Can you tell us what they are, please?

A I do telephone installation on a regular basis, advertised widely. I am also a landlord with rentals.

Q With respect to your telephone installation business, how long have you been employed in that field?

MR. SOBEL: Objection, your Honor; relevance.

THE COURT: What is the relevance?

MR. BENDURE: It will go to his ability to identify what he will be testifying about. I will get right to the point if it doesn't matter.

Q (By Mr. Bendure, continuing): Did the point ever come when you found a wiretap or other transmitter at Judge Ferrara's house?

A Yes.

MR. SOBEL: Excuse me. I move to strike on the grounds that the testimony has no relevance in these proceedings.

MR. BENDURE: It does, your Honor. It will show why the Judge was concerned when confronted with tapes that she felt had been fraudulently put together by Mr. Tarjeft. This will [p. 104] go to the background of why she had that concern. It goes to her state of mind.

THE COURT: Well, I don't think Mr. Maul has the ability to testify as to what Judge Ferrara's state of mind is.

MR. BENDURE: Well, I think he can independently identify events of which he was aware and contemporaneous statements of state of mind of Judge Ferrara. For example, by analogy, in a criminal self-defense case where the defendant's claim is self-defense, it is certainly relevant to have other people describe acts of violence by the victim on the defendant which would give the defendant's state of mind for self-defense. I guess I am saying that the person charged is not the only possible witness for events going to state of mind.

MR. SOBEL: Judge, if you think about it, it has no relevance at all, and it has no appropriate analogy to the self-defense raised by a criminal defendant. If you assume as Mr. Bendure would apparently have you assume that Judge Ferrara was under the belief that Mr. Tarjeft had intercepted her phone conversations by using some type of transmission device, that in no way would affect whether she believed that she used racial slurs in the course of having conversations with him. Her concerns have to relate to whether she used racial slurs, not to whether Mr. Tarjeft was using some type of device to bug her telephone conversations.

[p. 105] Obviously, he was recording them in some fashion. That became a matter of public knowledge. There is no mystery about that. She knew that. Whether it was through a bugging device or a tape recorder hooked up to his telephone, she can't use that as evidence that she had a legitimate concern about whether she used racial slurs.

MR. BENDURE: Are they dropping the charge, then, with respect to her later statements about the tapes believing that they weren't hers? If that is being dismissed, then we can go. But as long as that is a charge, I think I can get into her state of mind in making those statements based upon the history of her relationship with Mr. Tarjeft and him planting a bug.

THE COURT: I don't think this witness is going to have any evidentiary value as to that allegation, and I believe the testimony that is in this record is ample from Judge Ferrara herself as to what she thought at the time.

MR. BENDURE: But I want to go into the reasons why she thought the way she did.

THE COURT: She testified as to the reasons she thought the way she did.

MR. BENDURE: If the Court is saying that everything that Judge Ferrara says is accepted, that is one thing, but I suspect that Mr. Sobel may have a different point of view. And, therefore, the fact that we have got the evidence from [p. 106] Judge Ferrara shouldn't prohibit us from eliciting corroborative testimony. And it also goes to the reasonableness of her state of mind, and we are talking now about also a possible alternative source to the recordings themselves besides taping through the other route that I would like to get into.

MR. SOBEL: Judge, you know, I could well be missing something – I have done it in the past – but it occurs to me that if anything this witness' proposed testimony supports the Commission's case and doesn't in any way tend to refute it because it shows all the more reason why Judge Ferrara should have believed that the tape-recorded statements which became a matter of public knowledge were in fact tape-recorded by Mr. Tarjeft during telephone conversations that the two of them had.

THE COURT: Is that what Mr. Maul is going to testify to.

MR. BENDURE: Let me make an offer of proof.

THE COURT: No, answer the question.

MR. BENDURE: That he will testify that his testimony is going to support the Commission's case, I don't think he is going to offer that.

THE COURT: Mr. Bendure, can you state in about two or three sentences what the subject matter of Mr. Maul's testimony is.

[p. 107] MR. BENDURE: This particular area will be that on a specified date in 1994 he found a wiretap transmitter in Judge Ferrara's basement.

THE COURT: And what else?

MR. BENDURE: And in conjunction with that, Judge Ferrara expressed to him the concerns she had about Howard Tarjeft and his electronics expertise and what he could or could not do to destroy her.

THE COURT: All right, your offer of proof is there for the record. The objection is sustained.

Q (By Mr. Bendure, continuing): Do you have any experience in the area of locksmithing?

MR. SOBEL: Objection, your Honor; relevance.

MR. BENDURE: It would go to show that he at Judge Ferrara's behest changed the locks on several occasions because of her apprehension of Howard Tarjeft which in turn goes to her state of mind as testified to by Dr. Luby, and insofar as she may have made statements induced by Mr. Tarjeft due to the nature of their relationship.

THE COURT: Sustained.

Q (By Mr. Bendure, continuing): Did you have occasion to know Howard Tarjeft?

A I do not believe I have ever met him. I might have seen him on TV.

Q You did not have any first-hand information about his [p. 108] relationship with Judge Ferrara?

A Not where I saw him per se, but I have heard of the ongoing crisis, conflict, or whatever many, many times or about it.

Q Have you heard Judge Ferrara explain to you her state of mind regarding him?

MR. SOBEL: Objection, your Honor; relevance.

THE COURT: I will allow the answer to that question. It is not very relevant.

THE WITNESS: Could you repeat?

MR. BENDURE: Certainly.

Q (By Mr. Bendure, continuing): Have you heard Judge Ferrara explain to you her state of mind regarding Howard Tarjeft?

A Many times, I would say. Intrusion into the home, wire tapping –

MR. SOBEL: Objection, your Honor. I move to strike. That is not her state of mind.

THE COURT: Sustained.

Q (By Mr. Bendure, continuing): What, indeed, did she tell you about her state of mind?

A She seemed concerned, distressed.

Q Did she tell you why? What was the source of that distress?

A His –

THE COURT: His conduct?

THE WITNESS: His conduct.

THE COURT: That is enough.

[p. 109] Q (By Mr. Bendure, continuing): Did she explain the nature of the conduct that caused her to be concerned?

A Yes, it seemed like a wide variety of rude behavior and intrusions into her house, et cetera.

Q Were you able to compare her demeanor when she was talking about Howard Tarjeft versus her demeanor on other occasions.

MR. SOBEL: Objection, your Honor; relevance.

THE COURT: What is the relevance of that?

MR. BENDURE: Your Honor, they have offered tapes which purport to show bad language used induced by Howard Tarjeft, at least in conversations with Mr. Tarjeft and, I think, are seeking to have the Court draw the conclusion that that is characteristic of Judge Ferrara. We would like this witness to help us establish that Mr. Tarjeft elicited from her conduct, words, a state of anxiety, and the like which is uncharacteristic of her in other dealings.

THE COURT: Anything, Mr. Sobel?

MR. SOBEL: Well, I am a little confused. At first I thought he was asking this witness about whether he could compare her demeanor when she was talking about Mr. Tarjeft with her demeanor when she wasn't talking about Mr. Tarjeft. Now I gather that he wants the witness to compare her demeanor when she was making the tape-recorded statements during the phone conversations with Mr. Tarjeft with her demeanor when she wasn't making the tape-recorded phone [p. 110] conversations. And since there is no evidence that the man has even heard the tape-recorded statements, I don't know how he could make that comparison.

MR. BENDURE: I am not asking him to talk about her demeanor during tape-recorded statements or anything of the like; I am talking about –

THE COURT: I will sustain the objection.

Q (By Mr. Bendure, continuing): Without regard to specific transmitters in this case, are you aware of the possibility of using a transmitter to trigger a tape recorder?

MR. SOBEL: Objection, your Honor; relevance.

MR. BENDURE: It goes to a possible alternative explanation for what have been represented to be tapes that were made by Mr. Tarjeft simultaneously and without the aid of any electronic devices.

MR. SOBEL: I also object to this on the basis that it would be a violation of the Court's order regarding sanctions.

THE COURT: I was just about to say that I believe I issued an order relative to evidence about the tapes last week or a time or so ago. The objection is sustained.

MR. BENDURE: Your honor, this is not being offered to show the tapes.

THE COURT: The sanction didn't have anything to do with the purpose for which the evidence was going to be offered.

[p. 111] MR. BENDURE: So the Court's ruling is that we can't say anything at all about tapes or how the evidence may have been acquired?

THE COURT: Yes. That was the essence of the ruling.

(State of Michigan Standard Crime Report marked Defendant's Proposed Exhibit K)

MR. BENDURE: Recognizing the Court's ruling, I would like for identification purposes to have the witness to identify Exhibit K.

Q (By Mr. Bendure, continuing): Sir, let me show you what has been marked as Exhibit K and ask if that relates to an incident of which you have personal knowledge?

A It looks like the police report. What I did that night after observing the bug was take her ID card, bar card, judge card down to the police. I went to the dispatch.

MR. SOBEL: Your Honor, I move to strike this testimony. It was a simple question put to the witness.

THE COURT: It is a police report; correct?

THE WITNESS: Yes. It looks like the one from the –

THE COURT: From some incident; correct?

THE WITNESS: Yes, it has got my name on it.

MR. BENDURE: I will offer Exhibit K for the record.

MR. SOBEL: I would object. It is irrelevant.

THE COURT: I can't imagine what relevance it could have. Admission denied.

[p. 112] Q (By Mr. Bendure, continuing): The report before you, Exhibit K, was that the result of something you did yourself?

A Right. I was the one who went in person directly to the police department.

Q Now if one had a transmitter, would that only pick up telephone calls or would it pick up other events in the house?

MR. SOBEL: Excuse me. Objection; relevance. Also, I would object there is no basis that this witness has the requisite background to give an opinion on the subject of what a transmitter would pick up.

MR. BENDURE: With respect to the second, your Honor, when I started to lay the foundation, Mr. Sobel objected. I can go back and do that if you would like.

Q (By Mr. Bendure, continuing); Sir, can you tell us –

THE COURT: Mr. Bendure, it is extremely difficult for me to imagine that this witness' testimony is going to be relevant to my obligation as the Master in this hearing. And before you ask him another question, what is it that you are eliciting from him?

MR. BENDURE: What we are eliciting is that on the particular date he found the bug Judge Ferrara announced to him her state of mind that the transmitter would not only pick up phone calls but would also record other things in the house; that to the witness' or Judge Ferrara's knowledge [p. 113] there were actions by Howard Tarjeft indicating that he had knowledge of that nature, not by a telephone-recorded call, but by a transmitter; that this was illegal and in violation of Federal law which is entirely separate from taping a phone call; and that the use of a transmitter through a tape recorder could result in the tape recording of conversations; and that as a result of his experiences with Judge Ferrara and this particular incident, he knows that her locks were changed; he knows that she was apprehensive that Howard Tarjeft had the electronics expertise to create fake evidence, all of which will go minimally beside the Federal violation but will also go to show that Judge Ferrara had a reasonable apprehension about Howard Tarjeft, such that when purported copies of the tapes were played for –

THE COURT: Now you are arguing. Is that what the testimony is going to say. You are telling me now what the testimony would mean. I want you to limit this to what the testimony would be. Is there anything else that this witness would –

MR. BENDURE: I can't give it to you verbatim without being allowed to ask the quesitons.

THE COURT: Mr. Bendure, an offer of proof means as I understand it a brief encapsulated summary of what it is a witness' testimony would be anticipated to be. That is what an offer of proof is.

[p. 114] MR. BENDURE: I beg to differ that it would go farther and show what this testimony would tend to prove.

THE COURT: No, an offer of proof – No. Is there anything else that this witness would testify to?

MR. BENDURE: One more thing by way of an offer of proof, your Honor: The witness would testify that the object that he found was clearly a transmitter and that it was capable of covering the short distance between Judge Ferrara's house and the office, so to speak, of Howard Tarjeft above the baget shop on Mack.

THE COURT: All right.

MR. BENDURE: With that, I have no further questions.

THE COURT: You haven't asked a question. I am going to sustain the objection as to the offer of proof.

MR. SOBEL: Your Honor, I would like to put something on the record so that you are aware of it and so that when this record goes before the Commission and ultimately before the Supreme Court, they are aware of it as well. I believe that if the witness were allowed to answer the series of questions that Mr. Bendure proposes to ask and I was then able to cross-examine him about those subjects, or in the alternative and/or additionally brought in other evidence, I would be able to establish either through this witness or other witnesses that what Mr. Bendure has been referring to as a bug, a device to intercept conversations, was in fact turned [p. 115] over by the police department to the Federal Bureau of Investigation who determined that in fact it was not a bug at all, that it was not capable of intercepting any telephone or other conversations, that it was just some item that had no value whatsoever in terms of intercepting communications and, therefore, this witness' thought that this was a bug was in fact inaccurate.

MS. CUMBEY: Your Honor, I would ask that Mr. Sobel's remarks that he just made be stricken in their entirety from the record. Given his vociferous attempts to keep each and every piece of evidence that we have attempted to keep out, and then he attempts to inject on the record by these extemporaneous statements his speculations about what he would not allow us to put in and what his ability would be to do on cross-examination is outrageous. If he is that confident, let us put it in and let them tear it apart by cross-examination.

MR. SOBEL: I would just add, your Honor, I have seen the report that I have made reference to where the FBI reported that –

MS. CUMBEY: I am going to object. That is hearsay. It has no role on this record.

THE COURT: I would be extremely grateful if we all stopped interrupting one another during the course of this hearing. It is difficult for the record.

[p. 116] I have made a ruling relative to these tapes. The ruling was made about three or four weeks ago.

MS. CUMBEY: Absolutely, and if we are going to –

THE COURT: Ms. Cumbey, when I said interrupting, that included you.

I made a ruling relative to these tapes, their admissibility, and the issue of how the tapes were obtained, and I indicated that that was all I needed to hear.

By the way, whatever has been said by this witness and whatever has been said by either one of you, meaning you and Mr. Bendure – Mr. Bendure in terms of his offer of proof, and what is said by Mr. Sobel – I can assure you has absolutely no evidentiary value or relevance to the decision that I will ultimately have to make, and I am not going to strike his remarks.

MS. CUMBEY: If I may respond, your Honor, we were not even allowed to put in a simple offer of proof, yet he has de facto put in an offer of proof that has colored and tainted the entire proceedings.

THE COURT: Mr. Bendure just made an offer of proof as to what Mr. Maul would testify to. Were you in the courtroom while he was doing that?

MS. CUMBEY: I certainly was and I heard about twenty attempts to put in offers of proof rejected, and he wasn't even allowed to put in the offers of proof.

[p. 117] MR. BENDURE: Your Honor, can I ask the witness a question to respond to Mr. Sobel's offer of proof that he doesn't know a transmitter from a hole in the ground?

THE COURT: No.

Do you have any further questions of the witness?

MR. BENDURE: No, your Honor.

THE COURT: Mr. Sobel?

MR. SOBEL: No, your Honor, I have no questions.

THE COURT: Thank you. You may step down.

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